(32,172)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 605

N. & G. TAYLOR CO., INC., PETITIONER,

vs.

JOHN A. ANDERSON AND C. A. GUSTAFSON, DOING BUSINESS UNDER THE NAME OF ANDERSON & GUSTAFSON, COPARTNERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1926

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Adam C. Cliffe, District Judge of the United States for the Northern District of Illinois, on Tuesday, the sixth day of January, in the year of our Lord one thousand nine hundred and twenty-five, being one of the days of the regular December Term of said Court, begun Monday, the fifteenth day of December, and of our Independence the 149th year.

Present:

Honorable Adam C. Cliffe, District Judge.

Palmer E. Anderson, U. S. Marshal.

Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

N. & G. Taylor Company, a corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners,
} No. 32831

Be It Remembered, that the above entitled action was commenced by the filing of the following Declaration in the above-entitled cause, in the office of the Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division, on this the 7th day of March, A. D. 1918:

3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

N. & G. Taylor Company, a corporation,
Plaintiff,
vs.
John A. Anderson and C. A. Gustafson,
Defendants.

DECLARATION.

N. & G. Taylor Company, a corporation subsisting under and by virtue of the laws of the State of Pennsylvania, and having its principal office and usual place of business in Philadelphia, Pennsylvania, plaintiff, by Childs & Childs, its attorneys, complains against John A. Anderson and C. A. Gustafson, both of the City of Chicago, County of Cook and State of Illinois, doing business under the firm name of Anderson & Gustafson, said firm having its general office in

said city of Chicago, a plea of trespass on the case on promises:—

For That Whereas, on, to wit, the first day of November, 1916, at the City of New York, in the State of New York, the plaintiff, at the request of the said defendants, bargained with the said defendants to buy, and agreed to buy of them, and the defendants then and there sold, and agreed to sell, to the plaintiff, a large quantity, to wit, one million two hundred thousand (1,200,000) gallons of fuel oil, said oil to be of specific gravity 30 and 32 Baume, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, the said oil to be delivered at the rate of approxi-
4 mately equal amounts each month from November 1, 1916, to June 30, 1917, at the plant of said plaintiff at Cumberland, Maryland, a discount of one per cent to be allowed upon the purchase price, if the said plaintiff should make payment to the said defendants thereof within ten days from the delivery thereof, and thirty days' credit to be allowed for the payment of the entire amount; and in consideration thereof, and that the plaintiff had promised the defendants, at their request, to accept and receive the said oil, and to pay them for the same at the price aforesaid, they, the said defendants, on the day first aforesaid, in the county aforesaid, promised the said plaintiff to sell and to deliver the said oil to it as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of said oil; and although the said times for the delivery of the said oil have long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said oil and pay for the same at the price aforesaid, to wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have, with reasonable diligence, secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised; yet the said defendants did not nor would within the time aforesaid or afterward, deliver the said oil, except that the said defendants delivered to plaintiff four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at the said plant of the said plaintiff at Cumberland, Maryland, aforesaid; but refused so to do, whereby the said plaintiff has been subject to great loss, which it would not have suffered if the said oil

had been delivered in accordance with the promises of the said defendants as aforesaid.

For That, Whereas, on, to wit, the first day of November, 1916, at the City of New York, and State of New York, the plaintiff, at the request of the defendants, bargained for
5 and agreed to buy of the defendants a large quantity, to wit, one million two hundred thousand (1,200,000) gallons of fuel oil, said oil to be of the specific gravity 30 and 32 Baume, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, a discount of one per cent. to be allowed upon the purchase price if the said plaintiff should make payment to the said defendants therefor within ten days from the delivery thereof, and thirty days credit to be allowed for the payment of the net amount, and in consideration thereof, and that the plaintiff had promised the defendants, at their request, to accept and receive the said oil, and to pay them for the same at the price aforesaid, they, the said defendants, promised the said plaintiff to deliver the said oil to it as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of said oil; and although the said times for delivery of said oil have long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said oil and pay for the same at the price aforesaid, to wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could, by due diligence, have secured tank cars in sufficient numbers to make said deliveries as they had theretofore promised; yet the said defendants did not nor would within the time aforesaid, or afterwards, deliver the said oil, except that the said defendants delivered to plaintiff four tank cars of oil amounting approximately to forty thousand (40,000) gallons thereof at the said plant of the said plaintiff at Cumberland, Maryland, the said delivery of said forty thousand gallons of oil being greatly delayed, and not in accordance with the promises of the said defendants, and the said defendants refused to make the deliveries in accordance with their said promises; and because of the said failure on the part of said defendants and their re-
6 fusal to deliver the said oil, the said plaintiff was compelled to shut down its said plant for a considerable space of time, whereby the said plaintiff has been subjected

to great loss, which it would not have suffered if the said oil had been delivered in accordance with the promises of the said defendants as aforesaid.

For That Whereas, on, to wit, the firs day of November, 1916, at the City of New York, in the State of New York, the plaintiff, at the request of said defendants, bargained with the defendants to buy of them, and the defendants then and there sold, and agreed to sell, to the plaintiff, a large quantity, to wit, one million two hundred thousand (1,200,000) gallons of fuel oil, said oil to be of specific gravity 30 and 32 Baume at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery with freight allowed to Cumberland, Maryland, the said oil to be delivered at the rate of approximately equal amounts each month from November 1, 1916, to June 30, 1917, at the plant of the said plaintiff at Cumberland, Maryland, a discount of one per cent. to be allowed upon the purchase price if the said plaintiff should make payment thereof, and thirty days credit to be allowed for the payment of the entire amount; and in consideration thereof, and that the plaintiff had promised the defendants, at their request, to accept and receive the said oil, and to pay them for the same at the price aforesaid, they, the said defendants, on the day first aforesaid, in the county aforesaid, promised the said plaintiff to deliver the said oil to it, as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of the said oil; and although the said times for the delivery of the said oil have long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said oil and pay for the same at the price aforesaid, to wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised, if they had used due diligence in the matter; yet the said defendants did not nor would within the time aforesaid or afterwards deliver the said oil, (except that the said defendants delivered to plaintiff four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at the said plant of the said plaintiff at Cumberland, Maryland, aforesaid), but refused so to do; and because of the said failure and refusal of the said defendants, the said plaintiff was compelled to and did go into the market

to secure sufficient fuel oil with which to run its plant, and was compelled to pay and did pay therefor a sum in addition to the price for which said defendants agreed to deliver the said fuel oil, to wit, the defference between the said contract price at which defendants agreed to deliver the same, and the then market price of said fuel oil; whereby the said plaintiff has been subjected to a great loss, which it would not have suffered, if the said oil had been delivered in accordance with the promises of the said defendants aforesaid.

For That, Whereas, on, to wit, the first day of November, 1916, at the City of New York, and State of New York, the plaintiff, at the request of the defendants, bargained and agreed to buy of the defendants a large quantity, to wit, one million two hundred thousand (1,200,000) gallons of fuel oil, said oil to be of the specific gravity 30 and 32 Baume, at the price of five and one quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, the said oil to be delivered at the rate of approximately equal amounts each month from November 1, 1916, to June 30, 1917, at the plant of the said plaintiff at Cumberland, Maryland, a discount of one per cent. to be allowed upon the purchase price if the said plaintiff should make payment to the said defendants therefor within ten days from the delivery thereof, and thirty days credit to be allowed for the payment of the net amount, and in consideration thereof, and that the plaintiff had promised the defendants, at their request, to accept and receive the said oil, and to
8 pay them for the same at the price aforesaid, they, the said defendants, promised the said plaintiff to deliver the said oil to it as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of said oil; and although the said times for the delivery of said oil have long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said oil and pay for the same at the price aforesaid, to wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendant could, by due diligence, have secured tank cars in sufficient numbers to make said deliveries as they had theretofore promised; yet the said defendants did not nor would within the time aforesaid, or afterwards, deliver the said oil, (except that the said defendants delivered to plaintiff four tank cars of oil amounting approximately to forty

thousand (40,000) gallons thereof at the said plant of the said plaintiff at Cumberland, Maryland, the said delivery of the said forty thousand gallons of oil being greatly delayed, and not in accordance with the promises of the said defendants), and the said defendants refused to make the deliveries in accordance therewith; and because of the said failure on the part of said defendants and their refusal to deliver the said oil, the said plaintiff was compelled to shut down its said plant for a considerable space of time; and, thereafter, in order to continue the operation of the said plant the said plaintiff was compelled to and did go into the market to secure sufficient fuel oil with which to run its plant, and was compelled to and did pay therefor a sum in addition to the price for which said defendants agreed to sell and deliver the said fuel oil, to wit, the difference between the said contract price at which said defendants agreed to deliver the same and the then market price of said fuel oil; whereby the said plaintiff has been subjected to a great loss, which it would not have suffered, if the said oil had been delivered in accordance with the promises of said defendants aforesaid.

9 For That, Whereas, on, to wit, the first day of November, 1916, at the City of New York, in the State of New York, the plaintiff, at the request of the defendants, bargained with the said defendants for the purchase of certain fuel oil, the said agreement and promises of the said defendants and the said plaintiff being set down in writing, in the following words and figures, to wit:—

"New York, November 1, 1916.

"N. & G. Taylor Company,
Philadelphia, Penna.

"Gentlemen:

In reply to your letter of the 31st ult. and confirming conversation with the writer this date, we have entered your order for

"2 Tank Cars Fuel Oil, Gravity 30-32 FOB refinery, freight allowed to Cumberland, Md. @ 5.05c per gallon, terms 1%—10 days, 30 days net.

"Subject to our ability to secure tank cars, we submit as as follows:—

"Proposal to furnish the N. & G. Taylor Company, Philadelphia, Pennsylvania, with Fuel Oil at their Cumberland, Md., Plant.

"Quantity: Their requirements estimated at 1,200,000 gal-

lons, to taken out commencing November 1, 1916, and ending June 30th, 1917, in fairly equal monthly quantities.

"Specifications: The gravity of this oil shall be between 30 and 32 Baume.

"Price: The price shall be 5¼c per gallon f. o. b. tank cars refinery with freight allowed to Cumberland, Md.

"Terms: 1% net amount of invoice for cash in ten days from date of invoice, or 30 days net.

"Shipments: Shipments to be made in tank cars of eight to ten thousand gallons capacity, with the understanding that they furnish us at least 30 days advance notice of date of shipment.

"Rates: This delivered price made subject to freight rates now in effect. Any change in rates, whether advance or decline to revert to the buyer.

"War Tax: This price is not subject to include any tax that the Government may impose on the goods herein described. Should there be any such tax it will necessarily have to be added to the price above quoted.

"Acceptance: This proposal is submitted in duplicate, the prompt acceptance of which shall constitute a contract between us for the sale and shipment, purchase and acceptance of above goods, same subject to our ability to furnish tank cars; also with the understanding that the two cars for which we have entered your order will be representative of quality of the goods that will be shipped.

"Respectfully submitted,
"Anderson & Gustafson,
"By B. H. Klase (?)

"Dated at _____ this _____ day of _____ 1916.

"Accepted:
"N. & G. Taylor Co.
"By _____."

But although the said times for the delivery of said oil have long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said oil and pay for the same, at the price aforesaid, to wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised, if they had exercised a reasonable degree of diligence; yet the said defendants did not nor would within the time aforesaid, or

afterward, deliver the said oil, except that the said defendants delivered to the plaintiff four tank cars of oil, amounting to approximately forty thousand (40000) gallons thereof, at the said plant of the said plaintiff at Cumberland, Maryland, aforesaid); but refused so to do; whereby the said plaintiff has been subject to great loss, which it would not have suffered if the said oil had been delivered in accordance with the promises of the said defendants as aforesaid.

For That, Whereas, on, to wit, the first day of November, 1916, at the City of New York, in the State of New York, the plaintiff, at the request of the defendants, bargained with the said defendants for the purchase of certain fuel oil, the said agreement and promises of the said defendants and the said plaintiff being set down in writing, in the following words and figures; to wit:—

"New York, November 1, 1916.

"N. & G. Taylor Company,
Philadelphia, Penna.

"Gentlemen:

11 In reply to your letter of the 31st ult. and confirming conversation with the writer this date, we have entered your order for

"2 Tank Cars Fuel Oil, Gravity 30-32 FOB refinery, freight allowed to Cumberland, Md. @ 5.05c per gallon, terms 1%—10 days, 30 days net.

"Subject to our ability to secure tank cars, we submit as as follows:—

"Proposal to furnish the N. & G. Taylor Company, Philadelphia, Pennsylvania, with Fuel Oil at their Cumberland, Md., Plant.

"Quantity: Their requirements estimated at 1,200,000 gallons to taken out commencing November 1, 1916, and ending June 30th, 1917, in fairly equal monthly quantities.

"Specifications: The gravity of this oil shall be between 30 and 32 Baume.

"Price: The price shall be 5¼c per gallon f. o. b. tank cars refinery with freight allowed to Cumberland, Md.

"Terms: 1% net amount of invoice for cash in ten days from date of invoice, or 30 days net.

"Shipment: Shipments to be made in tank cars of eight to ten thousand gallons capacity, with the understanding that they furnish us at least 30 days advance notice of date of shipment.

"Rates: This delivered price made subject to freight rates now in effect. Any change in rates, whether advance or decline to revert to the buyer.

"War Tax: This price is not subject to include any tax that the Government may impose on the goods herein described. Should there be any such tax it will necessarily have to be added to the price above quoted.

"Acceptance: This proposal is submitted in duplicate, the prompt acceptance of which shall constitute a contract between us for the sale and shipment, purchase and acceptance of above goods, same subject to our ability to furnish tank cars; also with the understanding that the two cars for which we have entered your order will be representative of quality of the goods that will be shipped.

"Respectfully submitted,
"ANDERSON & GUSTAFSON,
"By B. H. KLASE (?)

"Dated at _____ this _____ day of _____ 1916.

"Accepted:
"N. & G. TAYLOR CO.
"By _____"

And although the said times for delivery of the said oil have long since elapsed, and the plaintiff has always been ready and willing to accept and receive the said oil and pay for the same at the price aforesaid, to wit, at the price
12 of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, a saforesaid, and although the said defendants could, with the exercise of due diligence, have secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised; yet the said defendants did not nor would within the time aforesaid, or afterwards, deliver the said oil, (except that the said defendants delivered to plaintiff four tank cars of oil, amounting to approximately forty thousand (40000) gallons thereof, at the said plant of the said plaintiff at Cumberland, Maryland, aforesaid); but refused so to do, and because of the said failure and refusal of the said defendants, the said plaintiff was compelled to and did go into the market to secure sufficient fuel oil with which to run its plant, and was compelled to pay and did pay therefor a sum in addition to the price for which said defendants agreed to deliver the said fuel oil, to wit, the difference between the said contract price at which de-

fendants agreed to deliver the same, and the then market price of the said fuel oil; whereby the said plaintiff has been subjected to a great loss, which it would not have suffered, if the said oil had been delivered in accordance with the promises of the said defendants aforesaid.

To the damage of the said plaintiff in the sum of twenty-five thousand dollars ($25,000.), and, therefore, it brings its suit, etc.

CHILDS & CHILDS,
Attorneys for Plaintiff.

(Endorsed): Filed March 7, 1918, T. C. Mac Millan, Clerk.

13 On the same day, to wit, the 7th day of March, A. D. 1918, a Writ of Summons issued out of the Clerk's office of said Court against said defendants in said above-entitled cause, as prayed for in said Praecipe, which said writ with the return of the Marshal thereon indorsed is in the words and figures following, to wit:

14 District Court of the United States of America } ss:
Northern District of Illinois }

United States of America To the Marshal of the Northern District of Illinois—Greeting:

We Command You to Summon John A. Anderson and C. A. Gustafson, if found in your District, to be and appear before our Judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next Term, thereof, to be holden at Chicago, in the District aforesaid, on the first Monday of April next, to answer unto N. & G. Taylor Company, a corporation, of a plea of trespass on the case upon promises, to its damages, as it alleges, of Twenty-five thousand dollars ($25,000.00), and have you then and there this Writ.

Witness, The Hon. Kenesaw M. Landis Judge of the District Court of the United States of America, at Chicago aforesaid, this seventh day of March, in the year of our Lord one thousand nine hundred and eighteen and of our Independence the 142d year.

T. C. MACMILLAN
Clerk.

(Seal)

I have served this writ within my district in the following manner to wit:

Upon the within named John A. Anderson by reading the same to and within his presence and hearing and at the same time delivering to him a copy thereof at Chicago, Illinois, this 14th day of March, A. D. 1918.

I was unable to find the within named C. A. Gustafson within my district.

Dated at Chicago, Illinois, this 1st day of April, A. D. 1918.

One service	2.00
One mile	.06
	2.06

JOHN H. BRADLEY,
U. S. Marshal.
By JOHN H. ANDERSON,
Deputy.

(Endorsed) Filed Apr. 2, 1918. T. C. MacMillan, Clerk. Gen. No. 32831 District Court of the United States Northern District of Illinois N & G Taylor Company, a corporation, vs. John A. Anderson, et al. Summons Returnable April Term, A. D. 1918 T. C. MacMillan, Clerk. Childs & Childs, Attorney.

15 And on to-wit: the 21st day of April, A. D. 1924, there was filed in the Clerk's office of said court a certain Amended Declaration, in words and figures following to-wit:

16 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

N. & G. Taylor Company, a corporation,
Plaintiff,
vs.
John A. Anderson and C. A. Gustafson,
Defendants.
No. 32831

AMENDED DECLARATION.

N. & G. Taylor Company, a corporation subsisting under and by virtue of the laws of the State of Pennsylvania, and having its principal office and usual place of business in Philadelphia, Pennsylvania, plaintiff, by Good, Childs, Bobb & Wescott, its attorneys, complains against John A. Anderson and C. A. Gustafson, both of the City of Chicago, County of Cook and State of Illinois, doing business under the firm name of Anderson & Gustafson, said firm having its general office in said City of Chicago, of a plea of trespass on the case on promises:—

For That Whereas, on to-wit, the first day of November, 1916, at the City of New York, in the State of New York, the plaintiff, at the request of the said defendants, bargained with the said defendants to buy, and agreed to buy of them, and the defendants then and there sold, and agreed to sell, to the plaintiff, a large quantity, to-wit, One Million Two Hundred Thousand (1,200,000) Gallons of Fuel Oil, said oil
17 to be of specific gravity 30 and 32 Baume, at the price of five and a quarter (5¼c) cents for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, the said oil to be delivered at the rate of approximately equal amounts each month from November 1, 1916, to June 30, 1917, at the plant of said plaintiff at Cumberland, Maryland, a discount of one per cent to be allowed upon the purchase price, if the said plaintiff should make payment to the said defendants therefor within ten days from the delivery thereof, and thirty days' credit to be allowed for the payment of the entire amount; and in consideration there-

of, and that the plaintiff had promised the defendants, at their request, to accept and receive the said oil, and to pay them for the same at the price aforesaid, they, the said defendants, on the day first aforesaid, in the County aforesaid, promised the said plaintiff to sell and to deliver the said oil to it as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of said oil; and although the said times for the delivery of the said oil have long since elapsed, and the plaintiff says that it has always kept, performed and complied with the said agreement and each and every term and condition thereof in the manner and form as agreed upon and has always been ready and willing to a accept and receive the said oil in accordance with the said agreement and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter (5¼c) cents for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have, with reasonable diligence, secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised; yet the said defendants did not nor would within the
18 time aforesaid or afterward, deliver the said oil, except that the said defendants delivered to plaintiff four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at the said plant of the said plaintiff at Cumberland, Maryland, aforesaid; but refused so to do, whereby the said plaintiff has been subject to great loss, which it would not have suffered if the said oil had been delivered in accordance with the promises of the said defendants as aforesaid.

For That Whereas, on, to-wit, the first day of November, 1916, at the City of New York, and State of New York, the plaintiff, at the request of the defendants, bargained for and agreed to buy of the defendants a large quantity, to-wit, one million two hundred thousand (1,200,000) gallons of fuel oil, said oil to be of the specific gravity 30 and 32 Baume, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, a discount of one per cent to be allowed upon the purchase price if the said plaintiff should make payment to the said defendants therefor within ten days from the delivery thereof, and thirty days credit to be allowed for the payment of the net amount, and in considera-

tion thereof, and that the plaintiff had promised the defendants, at their request, to accept and receive the said oil, and to pay them for the same at the price aforesaid, they, the said defendants, promised the said plaintiff to deliver the said oil to it as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of said oil; and although the said time for the delivery of said oil have long since elapsed, and the plaintiff says that it has always kept, performed and complied with the said agreement and each and every
19 term and condition thereof in manner and form as agreed upon, and has always been ready and willing to accept and receive the said oil in accordance with said agreement and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could, by due diligence, have secured tank cars in sufficient numbers to make said deliveries as they had theretofore promised; yet the said defendants did not nor would within the time aforesaid, or afterwards, deliver the said oil, except that the said defendants delivered to plaintiff four tank cars of oil amounting approximately to forty thousand (40,000) gallons thereof at the said plant of the said plaintiff at Cumberland, Maryland, the said delivery of said forty thousand gallons of oil being greatly delayed, and not in accordance with the promises of the said defendants, and the said defendants refused to make the deliveries in accordance with their said promises; and because of the said failure on the part of said defendants and their refusal to deliver the said oil, the said plaintiff was compelled to shut down its said plant for a considerable space of time, whereby the said plaintiff has been subjected to great loss, which it would not have suffered if the said oil had been delivered in accordance with the promise of the said defendants as aforesaid.

For That Whereas, on, to-wit, the first day of November, 1916, at the City of New York, in the State of New York, the plaintiff, at the request of the said defendants, bargained with the defendants to buy of them, and the defendants then and there sold, and agreed to sell, to the plaintiff, a large quantity, to-wit, one million two hundred thousand (1,200,000) gallons of fuel oil, said oil to be of specific gravity
20 30 and 32 Baume at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refin-

ery with freight allowed to Cumberland, Maryland, the said oil to be delivered at the rate of approximately equal amounts each month from November 1, 1916, to June 30, 1917, at the plant of the said plaintiff at Cumberland, Maryland, a discount of one per cent to be allowed upon the purchase price if the said plaintiff should make payment thereof, and thirty days credit to be allowed for the payment of the entire amount; and in consideration thereof, and that the plaintiff had promised the defendants, at their request, to accept and receive the said oil, and to pay them for the same at the price aforesaid, they, the said defendants, on the day first aforesaid, in the county aforesaid, promised the said plaintiff to deliver the said oil to it, as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of the said oil; and although the said time for the delivery of the said oil have long since elapsed, and the plaintiff says that it has always kept, performed and complied with the said agreement and each and every term and condition thereof in manner and form as agreed upon, and has always been ready and willing to accept and receive the said oil in accordance with the said agreement and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised, if they had used due diligence in the matter; yet the said defendants did not nor would within the time aforesaid or afterwards deliver the said oil, (except that the said defendants delivered to plaintiff four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at the said plant of the said plaintiff at Cumberland, Mary-
21 land, aforesaid), but refused so to do; and because of the said failure and refusal of the said defendants, the said plaintiff was compelled to and did go into the market to secure sufficient fuel oil with which to run its plant, and was compelled to pay and did pay therefor a sum in addition to the price for which said defendants agreed to deliver the said fuel oil, to-wit, the difference between the said contract price at which defendants agreed to deliver the same, and the then market price of said fuel oil; whereby the said plaintiff has been subjected to a great loss, which it would

not have suffered, if the said oil had been delivered in accordance with the promises of the said defendants aforesaid.

For That Whereas, on, to-wit, the first day of November, 1916, at the City of New York, and State of New York, the plaintiff, at the request of the defendants, bargained and agreed to buy of the defendants a large quantity, to-wit, one million two hundred thousand (1,200,000) gallons of fuel oil, said oil to be of the specific gravity 30 and 32 Baume, at the price of five and one quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, the said oil to be delivered at the rate of approximately equal amounts each month from November 1, 1916, to June 30, 1917, at the plant of the said plaintiff at Cumberland, Maryland, a discount of one per cent to be allowed upon the purchase price if the said plaintiff should make payment to the said defendants therefor within ten days from the delivery thereof, and thirty days credit to be allowed for the payment of the net amount, and in consideration thereof, and that the plaintiff had promised the defendant, at their request, to accept and receive the said oil, and to pay them for the same at the price aforesaid, they, the said defendants, promised the said plaintiff to deliver the said oil to it as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank
22 cars for the shipment of said oil; and although the said times for the delivery of said oil have long since elapsed, and the plaintiff says that it has always kept, performed and complied with the said agreement and each and every term and condition thereof, in manner and form as agreed upon, and has always been ready and willing to accept and receive the said oil in accordance with said agreement and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendant could, by due diligence, have secured tank cars in sufficient numbers to make said deliveries as they had theretofore promised; yet the said defendants did not nor would within the time aforesaid, or afterwards, deliver the said oil, (except that the said defendants delivered to plaintiff four tank cars of oil amounting approximately to forty thousand (40,000) gallons thereof at the said plant of the said plaintiff at Cumberland, Maryland, the said delivery of the said forty thousand gallons of oil being greatly delayed, and not in accord-

ance with the promises of the said defendants,) and the said defendants refused to make the deliveries in accordance therewith; and because of the said failure on the part of said defendants and their refusal to deliver the said oil, the said plaintiff was compelled to shut down its said plant for a considerable space of time; and, thereafter, in order to continue the operation of the said plant the said plaintiff was compelled to and did go into the market to secure sufficient fuel oil with which to run its plant, and was compelled to and did pay therefor a sum in addition to the price for which said defendants agreed to sell and deliver the said fuel oil, to-wit, the difference between the said contract price at which said defendants agreed to deliver the same and the
23 then market price of said fuel oil; whereby the said plaintiff has been subjected to a great loss, which it would not have suffered, if the said oil had been delivered in accordance with the promises of said defendants aforesaid.

For That Whereas, on, to-wit, the first day of November, 1916, at the City of New York, in the State of New York, the plaintiff, at the request of the defendants, bargained with the said defendants for the purchase of certain fuel oil, the said agreement and promises of the said defendants and the said plaintiff being set down in writing, in the following words and figures, to-wit:

"New York, November 1, 1916.

"N. & G. Taylor Company,
Philadelphia, Penna.

"Gentlemen:—

In reply to your letter of the 31st ult, and confirming conversation with the writer this date, we have entered your order for

"2 Tank Cars Fuel Oil, Gravity 30-32 FOB refinery, freight allowed to Cumberland, Md. @ 5.05c per gallon, terms 1%-10 days, 30 days net.

"Subject to our ability to secure tank cars, we submit as follows:—

"Proposal to furnish the N. & G. Taylor Company, Philadelphia, Pennsylvania, with Fuel Oil at their Cumberland, Md. plant.

"Quantity: Their requirements estimated at 1,200,000 gallons, to be taken out commencing November 1, 1916, and ending June 30th, 1917, in fairly equal monthly quantities.

"Specifications: The gravity of this oil shall be between 30 and 32 Baume.

"Price: The price shall be 5¼c per gallon f. o. b. tank cars refinery with freight allowed to Cumberland, Md.

"Terms: 1% net amount of invoice for cash in ten days from date of invoice, or 30 days net.

"Shipments: Shipments to be made in tank cars of eight to ten thousand gallons capacity, with the understanding that they furnish us at least 30 days advance notice of date of shipment.

24 "Rates: This delivered price made subject to freight rates now in effect. Any change in rates, whether advance or decline to revert to the buyer.

"War Tax: This price is not subject to include any tax that the Government may impose on the goods herein described. Should there be any such tax it will necessarily have to be added to the price above quoted.

"Acceptance: This proposal is submitted in duplicate, the prompt acceptance of which shall constitute a contract between us for the sale and shipment, purchase and acceptance of above goods, same subject to our ability to furnish tank cars; also with the understanding that the two cars for which we have entered your order will be representative of quality of the goods that will be shipped.

Respectfully submitted,

ANDERSON & GUSTAFSON

By B. H. KLASE (?)

"Dated at ..... this ..... day of ..... 1916.

"Accepted:

N. & G. Taylor Co.

By ....."

But although the said times for the delivery of said oil have long since elapsed, and the plaintiff alleges that it has always kept, performed and complied with each and every term and condition of said contract in manner and form as therein required and have always been ready and willing to accept and receive the said oil in accordance with the said contract and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have secured tank cars in sufficient

numbers to make the said deliveries as they had theretofore promised, if they had exercised a reasonable degree of diligence; yet the said defendants did not nor would within the time aforesaid, or afterwards, deliver the said oil, (except that the said defendants delivered to the plaintiff four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at the said plant of the said plaintiff at Cumberland, Maryland, aforesaid) but refused so to do; whereby the said plaintiff has been subject to great loss, which it would not have suffered if the said oil had been delivered in accordance with the promises of the said defendants as aforesaid.

For That Whereas, on, to-wit, the first day of November, 1916, at the City of New York in the State of New York, the plaintiff, at the request of the defendants, bargained with the said defendants for the purchase of certain fuel oil, the said agreement and promises of the said defendants and the said plaintiff being set down in writing, in the following words and figures, to-wit:

"New York, November 1, 1916.

"N. & G. Taylor Company,
Philadelphia, Penna.

"Gentlemen:—

In reply to your letter of the 31st ult. and confirming conversation with the writer this date, we have entered your order for

"2 Tank Cars Fuel Oil, Gravity 30-32, FOB refinery, freight allowed to Cumberland, Md. @ 5.05c per gallon, terms 1%-10 days, 30 days net.

"Subject to our ability to secure tank cars, we submit as follows:—

"Proposal to furnish the N. & G. Taylor Company, Philadelphia, Pennsylvania, with Fuel Oil at the Cumberland, Md. plant.

"Quantity: Their requirements estimated at 1,200,000 gallons, to be takes out commencing November 1, 1916, and ending June 30th, 1917, in fairly equal monthly quantities.

"Specifications: The gravity of this oil shall be between 30 and 32 Baume.

"Price: The price shall be 5¼c per gallon f. o. b. tank cars refinery with freight allowed to Cumberland, Md.

"Terms: 1% net amount of invoice for cash in ten days from date of invoice, or 30 days net.

"Shipment: Shipments to be made in tank cars of eight to ten thousand gallons capacity, with the understanding that they furnish us at least 30 days advance notice of date of shipment.

Rates: This delivered price made subject to freight
26 rates now in effect. Any change in rates whether advance or decline to revert to the buyer.

"War Tax: This price is not subject to include any tax that the Government may impose on the goods herein described. Should there be any such tax it will necessarily have to be added to the price above quoted.

"Acceptance: This proposal is submitted in duplicate, the prompt acceptance of which shall constitute a contract between us for the sale and shipment, purchase and acceptance of above goods, same subject to our ability to furnish tank cars; also with the understanding that the two cars for which we have entered your order will be representative of quality of the goods that will be shipped.

Respectfully submitted,

ANDERSON & GUSTAFSON

By B. H. KLASE (?)

"Dated at _____ this _____ day of _____ 1916.

"Accepted:

N. & G. Taylor Co.

By _____."

And although the said times for delivery of the said oil have long since elapsed, and the plaintiff alleges that it has always kept, performed and complied with each and every term and condition of said contract in manner and form as therein required and has always been ready and willing to accept and receive the said oil, in accordance with the said contract, and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could, with the exercise of due diligence, have secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised; yet the said defendants did not nor would within the time aforesaid, or afterwards, deliver the said oil, (except that the said defendants delivered to plaintiff four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at

the said plant of the said plaintiff at Cumberland, Mary-
27 land, aforesaid) but refused so to do, and because of the said failure and refusal of the said defendants, the said plaintiff was compelled to and did go into the market to secure sufficient fuel oil with which to run its plant, and was compelled to pay and did pay therefor a sum in addition to the price for which said defendants agreed to deliver the said fuel oil, to-wit, the difference between the said contract price at which defendants agreed to deliver the same, and the then market price of the said fuel oil; whereby the said plaintiff has been subjected to a great loss, which it would not have suffered, if the said oil had been delivered in accordance with the promises of the said defendants aforesaid.

To the Damage of the Said Plaintiff in the sum of twenty five thousand dollars ($25,000.00) and, therefore, it brings its suit, etc.

GOOD, CHILDS, BOBBS & WESCOTT,
Attorneys for Plaintiff.

(Endorsed) Filed April 21, 1924. John H. R. Jamar, Clerk.

28 And on to-wit: the 29th day of April, 1924, there was filed in the Clerk's office of said court a certain Demurrer, in words and figures following to-wit:

29 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

N. & G. Taylor Company, a corporation, *Plaintiff*,
vs.
John A. Anderson and C. A. Gustafson, *Defendants*.
} No. 32831.

And the defendants, by Alden, Latham & Young, their attorneys, come and defend, etc., and demur to the declaration filed herein, and to each and every count thereof, and say that the matters and things therein contained, in the manner

and form as the same are set out and alleged, are not sufficient in law to entitle the plaintiff to maintain its aforesaid action, and that they, the defendants, are not bound by law to answer the same; and this they are ready to verify:

Wherefore, for want of sufficient declaration, the defendants pray judgment, and that the plaintiff may be barred from maintaining its aforesaid action.

ALDEN, LATHAM & YOUNG,
Attorneys for Defendants.

(Endorsed): Filed Apr 29, 1924, John H. R. Jamar, Clerk.

30 And afterwards on, to wit, the 5th day of May, 1924, this matter coming on to be heard, the following order was entered by the Court:

31 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Monday, May 5, A. D. 1924.

Present: Honorable Adam C. Cliffe, District Judge.

N. & G. Taylor Company, Inc. a corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners,
} No. 32831.

ORDER.

Upon motion, leave is hereby granted the Plaintiff to amend the Declaration on its face, and now this cause comes on to be heard on Demurrer to the Declaration as amended. After hearing arguments of Counsel and being now fully advised in the premises,

It Is Ordered by the Court the the Demurrer be overruled

as to the first and fifth Counts of the Declaration, to which ruling the Defendants except.

It Is Further Ordered by the Court that the Demurrer to the Second, Third, Fourth and Sixth Count of the Declaration be sustained, to which ruling the Plaintiff excepts.

32 And on to wit: the 6th day of May, A. D. 1924, there was filed in the Clerk's office of said court a certain Amendments to Amended Declaration, in words and figures following to wit:

33 In the District Court of the United States

For the Northern District of Illinois

Eastern Division.

N. & G. Taylor Company, a corporation, *vs.* John A. Anderson and C. A. Gustafson, } No. 32831.

AMENDMENTS TO AMENDED DECLARATION.

And now comes the Plaintiff, N. & G. Taylor Company, a corporation, by Good, Childs, Bobb and Wescott, its attorneys, and on permission first had and obtained from the Court, amends its amended Declaration as follows, to wit:

Amend Page 1 by adding the words "to wit" in the second line from the bottom, the following "its requirements estimated at."

On page three after the word "subject" in the fifth line from the top of the page the letters "ed."

On page 3, after the words "which it" in the sixth line from the top of the page, the words "sustained and."

On page three after the words "to wit" in the fourth line of the second paragraph the words "its requirements estimated at."

On page three, after the words "net amount" and the comma following thereafter in the tenth line from the bottom of the page, the words "which said requirements were then and

there known by the defendants to be the amount of fuel oil required to operate its manufacturing plant."

On page four after the words "the said oil" at the end of the sixth line from the end of the first paragraph, the words "and the inability of the plaintiff to secure fuel oil
34 at certain times."

On page six, after the words "to wit" in the fourth line of the second paragraph the words "its requirements estimated at."

On the sixth page after the words "amount" at the beginning of the sixth line from the bottom of the page, the words "which said requirements were then and there known by the defendants to be the amount of fuel oil required to operate its manufacturing plant."

On page seven, after the words "said oil" in the ninth line from the bottom of said page, the words "and the inability of the plaintiff to secure fuel oil at certain times."

On page ten, after the word "subject" in the second line from the top of the said page, the letters "ed" and in the same line after the words "which it" the words "sustained and."

On page 1 2nd line change word Pennsylvania to Maryland.

GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Plaintiff.

(Endorsed): Filed May 6, 1924. John H. R. Jamar, Clerk.

35 And on to wit: the 7th day of May, A. D. 1924, there was filed in the Clerk's office of said court a certain Additional Plea, in words and figures following to wit: Filed 1924

36 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois.

N. & G. Taylor Company, a corporation, *Plaintiff,*
vs.
John A. Anderson and C. A. Gustafson, *Defendants.*
} No. 32831.

ADDITIONAL PLEA.

And for a further plea in this behalf, the defendants say that the plaintiff ought not to have its aforesaid action

against them, the defendants, because they say that, during all the times mentioned in the first and fifth counts of plaintiff's amended declaration as amended, the defendants were unable to, nor could they with the exercise of all due diligence on their part, obtain tank cars for the shipment of said oil, with the exception of a small portion thereof; and the defendants further allege that shortly after the making of the alleged contract mentioned in the first and fifth counts of plaintiff's amended declaration as amended, certain common carriers, engaged in the business among other things of transporting oil in interstate commence between the several states of the United States, placed an embargo upon the use of their tank cars and did refuse to permit said cars to be loaded with oil destined for points East of the boundary line between the States of Ohio and Indiana, and did refuse to permit their tank cars to be moved East of said boundary line; and the said carriers did further restrict the use and movement of their tank cars, so that for this reason and because of other conditions which arose at or about the time
37 of the making of the said alleged contract mentioned in the said first and fifth counts of said amended declaration as amended, and which continued throughout all the times mentioned in said first and fifth counts of said amended declaration as amended, for the delivery of said oil, the defendants were unable to nor could they with the exercise of all due diligence on their part, obtain tank cars for the shipment of said oil.

And this the defendants are ready to verify.

Wherefore, they pray judgment if the plaintiff ought to have its aforesaid action against them, etc.

ALDEN, LATHAM & YOUNG,
Attorneys for Defendants.

38 (Endorsed): Filed May 7, 1924. John H. R. Jamar, Clerk. No. 32831. U. S. District Court, Northern District of Ill. N. & G. Taylor Company vs. John A. Anderson and C. A. Gustafson. Additional Plea. Filed May 7, 1924, at ____ o'clock ____ M. John H. R. Jamar Clerk. Alden Latham & Young, Attorneys at Law, 134 South La Salle Street, Chicago.

39 And on to wit: the 7th day of May, A. D. 1924, there was filed in the Clerk's office of said court a certain Plea in words and figures following to wit:

40 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

N. & G. Taylor Company, a corporation, *Plaintiff,*
vs.
John A. Anderson and C. A. Gustafson, *Defendants.*
} No. 32831.

Now comes John A. Anderson and C. A. Gustafson, defendants in the above entitled cause, by W. T. Alden, C. R. Latham and H. P. Young, their attorneys, and defend the wrong and injury, when, etc., and as to the first and fifth counts of plaintiff's amended declaration as amended filed herein, say that they did not promise in manner and form as the plaintiff has above thereof complained against them, and of this they put themselves upon the country, etc.

ALDEN, LATHAM & YOUNG,
Attorneys for Defendants.

(Endorsed): Filed May 7, 1924. John H. R. Jamar, Clerk.

41 (Endorsed): No. 32831. U. S. District Court, Northern District of Ill. N. & G. Taylor Company vs. John A. Anderson and C. A. Gustafson. Plea. Filed May 7, 1924, at ____ o'clock ____ M. John H. R. Jamar, Clerk. Alden, Latham & Young, Attorneys at Law, 134 South La Salle Street, Chicago.

42 And on to wit: the 14th day of May, A. D. 1924, there was filed in the Clerk's office of said court a certain Additional Pleas, in words and figures following, to wit:

43 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

N. & G. Taylor Company, a corporation, *Plaintiff*,

vs.

John A. Anderson and C. A. Gustafson, Co-partners doing business as Anderson & Gustafson, *Defendants*,

No. 32831.

FIRST ADDITIONAL PLEA TO THE AMENDED FIRST AND FIFTH COUNTS OF THE PLAINTIFF'S AMENDED DECLARATION AS AMENDED.

And for a further plea in this behalf, the defendants say that the plaintiff ought not to have its aforesaid action against them, the defendants, because they say:

That the several supposed causes of action in the said amended first and fifth counts to the amended declaration as amended did not, nor did any or either of them, accrue to the plaintiff at any time within six years next before the commencement of this suit and the filing herein by the plaintiff of its said amended first and fifth counts to its said amended declaration as amended, in manner and form as the plaintiff has above complained against them, the defendants. And the defendants state that under the statutes of Illinois in force at the time of the commencement of this suit and the filing herein of the plaintiff's first and fifth counts to its said amended declaration as amended, being Chapter 83, Section 20 Revised Statutes of Illinois, it is provided as follows:

"When a cause of action has arisen in a state or territory out of this state or in a foreign country and by the laws thereof and action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

44 and that by the statutes of New York in force at the time of the commencement of this suit and the filing herein by the plaintiff of its said amended first and fifth counts to its said amended declaration as amended, it was provided as follows:

"Unless actions are begun within the following periods after the accruing thereof, they are barred: upon contracts,

express or implied, other than judgments or sealed instruments, upon statutory liability other than as a penalty or forfeiture, to recover a chattel to establish a will, injury to property or person, except as otherwise provided, any action to procure a judgment on the ground of fraud after it is discovered, on a judgment by a court not of record, not docketed in the County Clerk's office, six years."

And the defendants say that the said supposed causes of action set forth in the said plaintiff's amended first and fifth counts to its said amended declaration as amended, and each and every of them, arose in the State of New York more than six years prior to the commencement of this suit and the filing herein by the plaintiff of its said amended first and fifth counts to its said amended declaration as amended, and that by the laws of New York as above set forth, an action thereon could not be maintained at the time of the commencement of this suit and the filing herein by the plaintiff of its amended first and fifth counts to its said amended declaration as amended, by reason of the lapse of time, and that by the statutes of Illinois above set forth, an action thereon could not be maintained in Illinois upon said supposed causes of action, and that said supposed causes of action are barred both by the laws of New York and by the laws of Illinois as aforesaid, and this the defendants are ready to verify: wherefore, it prays judgment if the plaintiff ought to have its aforesaid action against them, the defendants.

ALDEN, LATHAM & YOUNG,
Attorneys for Defendants.

45 United States of America
Northern District of Illinois.
State of Illinois
County of Cook
} ss.

HOBART P. YOUNG, being first duly sworn, on oath deposes and says that he is the duly authorized agent in this behalf, of John A. Anderson and C. A. Gustafson, Defendants in the foregoing pleas; that he is duly authorized to make this affidavit on behalf of said defendants; that he has read said pleas and that the same are true.

HOBART P. YOUNG.

Subscribed and sworn to before me this 14th day of May, A. D. 1924.

(Seal)

H. M. BYALL,
Notary Public, Cook County, Illinois.

46 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

N. & G. Taylor Company, a corporation,
Plaintiff,
vs.
John A. Anderson and C. A. Gustafson, Co-partners doing business as Anderson & Gustafson,
Defendants.
} No. 32831.

SECOND ADDITIONAL PLEA TO THE AMENDED FIRST AND FIFTH COUNTS OF THE PLAINTIFF'S AMENDED DECLARATION AS AMENDED.

And for a further plea in this behalf, the defendants say that the plaintiff ought not to have its aforesaid action against them, the defendants, because they say:

That the several supposed causes of action in the said amended first and fifth counts to the amended declaration as amended did not, nor did any or either of them accrue to the plaintiff at any time within six years next before the commencement of this suit and the filing herein by the plaintiff of its said amended first and fifth counts to its said amended declaration as amended, in manner and form as the plaintiff has above complained against them, the defendants. And the defendants state that under the statutes of Illinois in force at the time of the commencement of this suit and the filing herein of the plaintiff's first and fifth counts to its said amended declaration as amended, being Chapter 83, Section 20, Revised Statutes of Illinois, it is provided as follows:

"When a cause of action has arisen in a state or territory out of this state or in a foreign country and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

47 and that by the statutes of Pennsylvania in force at the time of the commencement of this suit and the filing herein by the plaintiff of its said amended first and fifth counts to its said amended declaration as amended, it was provided (Section 13,857 Pennsylvania Statutes) as follows:

"All actions on contracts, notes, and instruments not under seal, must be commenced within six years from the time the right of action accrues, and not after."

And the defendants say that the said supposed causes of action set forth in the said plaintiff's amended first and fifth counts to its said amended declaration as amended, and each and every of them, arose in the State of Pennsylvania more than six years prior to the commencement of this suit and the filing herein by the plaintiff of its said amended first and fifth counts to its said amended declaration as amended, and that by the laws of Pennsylvania as above set forth, an action thereon could not be maintained at the time of the commencement of this suit and the filing herein by the plaintiff of its amended first and fifth counts to its said amended declaration as amended, by reason of the lapse of time, and that by the statutes of Illinois above set forth, an action thereon could not be maintained in Illinois upon said supposed causes of action and that said supposed causes of action are barred both by the laws of Pennsylvania and by the laws of Illinois as aforesaid, and this the defendants are ready to verify: wherefore, it prays judgment if the plaintiff ought to have its aforesaid action against them, the defendants.

ALDEN, LATHAM & YOUNG,
Attorneys for defendants.

48 United States of America
Northern District of Illinois
State of Illinois
County of Cook } ss.

HOBART P. YOUNG, being first duly sworn, on oath deposes and says that he is the duly authorized agent in this behalf, of John A. Anderson and C. A. Gustafson, Defendants in the foregoing pleas; that he is duly authorized to make this affidavit on behalf of said defendants; that he has read said pleas and that the same are true.

HOBART P. YOUNG.

Subscribed and sworn to before me this 14th day of May, A. D. 1924.

H. M. BYALL,
(Seal) *Notary Public, Cook County, Illinois.*

(Endorsed) Filed May 14, 1924. John H. K. Jamar, Clerk.

49 (Endorsed) No. 32831. District Court of United States Northern District of Illinois. N. & G. Taylor Co., a corp., v. John A. Anderson and C. A. Gustafson, Co-partners, doing business as Anderson & Gustafson. Additional Pleas. Alden, Latham & Young Attorneys at Law 134 South La Salle Street Chicago

50 And on to-wit: the 14th day of May, A. D. 1924, there was filed in the Clerk's office of said court a certain Replication, in words and figures following, to-wit:

51 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois.

N. & G. Taylor Company, a Corporation, *Plaintiff*,
vs.
John A. Anderson and C. A. Gustafson, *Defendants*. } No. 32,831.

REPLICATION.

And the plaintiff as to the additional plea of the defendants by them above pleaded to the first and fifth counts of the plaintiff's amended declaration as amended, says: That it, the plaintiff by reason of anything in the said plea alleged, ought not to be barred from having and maintaining its aforesaid action in the said declaration alleged because it says that it the said plaintiff denies that during all the times mentioned in said declaration, and each count thereof, the defendants were unable to, and that they could not, with the exercise of all due diligence on their part, obtain tank cars for the shipment of said oil, with the exception of a small portion thereof as in the defendants said plea above alleged, and it further denies that by reason of any alleged embargoes, shortly after the making of the said contract, in
52 the said declaration mentioned, by certain common carriers engaged among other things in the business of transporting oil in interstate commerce between the several states of the United States, placed upon the use of their tank cars to points east as the said plea alleged, or the restriction by said carriers of the use of their tank cars or that by such

or other conditions which arose at or about the time of making the contract in said declaration mentioned, or that for either or any of the forepoing reasons the said defendants were unable with the exercise of all due diligence on their part, to obtain tank cars for the shipment of the said oil.

And it further denies that by reason of any such alleged embargoes or other conditions alleged to have continued throughout all of the times mentioned in the said declaration, the said defendants, with the exercise of all due diligence on their part, were unable to obtain tank cars for the shipment of said oil.

And this the plaintiff prays may be inquired of by the Country.

GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Plaintiff.

(Endorsed) Filed May 14, 1924. John H. R. Jamar, Clerk.

53 And on to-wit: the 14th day of May, A. D. 1924, there was filed in the Clerk's office of said court a certain Replication, in words and figures following to-wit: Filed 192

54 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

N. & G. Taylor Company, a corporation,
Plaintiff,
vs.
John A. Anderson and C. A. Gustafson, Co-partners doing business as Anderson & Gustafson,
Defendants.
No. 32831.

REPLICATION TO FIRST AND SECOND ADDITIONAL PLEA TO THE AMENDED FIRST COUNTS OF PLAINTIFF'S DECLARATION AS AMENDED.

And the plaintiff, as to the first additional plea of the defendants by them above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because it says that

the said several causes of action and each and every of them did accrue to it within six (6) years next before the commencement of this suit, in manner and form as it has above complained against the defendants: And this the plaintiff prays may be inquired of by the country.

And the plaintiff, as to the second additional plea of the defendants by them above pleaded, says that it, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having its aforesaid action, because it says that the said several causes of action and each and every of them did accrue to it within six (6) years next before the commencement of this suit, in manner and form as it has above complained against the defendants: And this the plaintiff prays may be inquired of by the country.

GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Complainants.

(Endorsed) Filed May 14, 1924. John H. R. Jamar, Clerk.

54. 55 And on to-wit: the 14th day of May, A. D. 1924, there was filed in the Clerk's office of said court a certain Amended First and Fifth Counts to the Amended Declaration, in words and figures following to-wit:

56 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

N. & G. Taylor Company, a corporation, *Plaintiff,* vs. John A. Anderson and C. A. Gustafson, *Defendants.*	No. 32,831

AMENDED FIRST AND FIFTH COUNTS TO THE AMENDED DECLARATION

N. & G. Taylor Company, a corporation existing under and by virtue of the laws of the State of Maryland, and having its principal office and usual place of business in Philadelphia, Pennsylvania, which said corporation was incorporated and

doing business under the laws of Maryland on, to-wit, February first, 1917, and which said corporation on said date took over and assumed all the liabilities of H. N. Taylor and William W. Justice, Jr., co-partners, doing business as N. & G. Taylor Company, and on said date became vested with all of the assets of the said copartnership, plaintiff, by Good, Childs, Bobb & Wescott, its attorneys, complains against
57 John A. Anderson and C. A. Gustafson, both of the City of Chicago, County of Cook and State of Illinois, doing business under the firm name of Anderson & Gustafson, said firm having its general offices in said City of Chicago, of a plea of trespass on the case on promises:

First Count

For That Whereas, on to-wit, the first day of November, 1916, at the City of New York, in the State of New York, H. N. Taylor and William W. Justice, Jr., co-partners, doing business as N. & G. Taylor Company—since then, on, to-wit, February first, 1917, succeeded by N. & G. Taylor Company, a corporation plaintiff herein, which on such date took over and became vested with all of the assets and assumed all of the liabilities of the said partnership, including the agreement hereinafter set forth, and all of the rights and liabilities appertaining thereto—at the request of the said defendants, bargained with the said defendants to buy, and agreed to buy of them and the defendants then and there sold, and agreed to sell to the said N. & G. Taylor Company, copartners, a large quantity, to-wit, their requirements estimated at One Million Two Hundred Thousand (1,200,000) Gallons of Fuel Oil, said oil to be of specific gravity 30 and 32 Baume, at the price of five and a quarter (5¼) cents for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland Maryland, the said oil to be delivered at the rate of approximately equal amounts each month from November first, 1916, to June thirteenth, 1917, at their plant at Cumberland, Maryland, a discount of one per cent to be allowed
58 upon the purchase price, if they should make payment to the said defendants therefor within ten days from the delivery thereof, and thirty days' credit to be allowed for the payment of the entire amount; and in consideration thereof, and that the said N. & G. Taylor Company, copartners, had promised the defendants, at their request, to accept and receive the said oil, and to pay them for the same at the price

aforesaid, they, the said defendants, on the day first aforesaid, in the County aforesaid, promised the said N. & G. Taylor Company, copartners, to sell and to deliver the said oil to them as aforesaid, said deliveries, however, being subject to the ability of the said defendants to secure tank cars for the shipment of said oil; and although the said times for the delivery of the said oil have long since elapsed, and the plaintiff says that it and its predecessor, N. & G. Taylor Company, copartners, have always kept; performed and complied with the said agreement and each and every term and condition thereof in the manner and form as agreed upon and have always been ready and willing to accept and receive the said oil in accordance with the said agreement and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter (5¼) cents for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have, with due diligence, secured tank cars in sufficient numbers to make the said deliveries as they had theretofore promised; yet the said defendants did not nor would they within the time aforesaid, either prior to February first, 1917, to N. & G. Taylor Company, copartners, or afterwards to N. & G. Taylor Company, Incorporated, deliver the said oil, except
59 that the said defendants delivered to N. & G. Taylor Company, copartners, four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at the said plant of N. & G. Taylor Company, copartners, acquired by the said plaintiff on February first, 1917, at Cumberland, Maryland, aforesaid; but refuses so to do, whereby the said plaintiff itself and as successor of N. & G. Taylor Company, copartners, has been subjected to great loss, which it sustained and would not have suffered if the said oil had been delivered in accordance with the promises of the said defendants as aforesaid.

Fifth Count

For That Whereas on, to wit, the first day of November, 1916, at the City of New York, in the State of New York, H. N. Taylor and William W. Justice, Jr., copartners, doing business as N. & G. Taylor Company—since then, on, to-wit, February first, 1917, succeeded by N. & G. Taylor Company, a corporation, plaintiff herein, which on said date took over and became vested with all of the assets and assumed all of

the liabilities of the said partnership, including the contract hereinafter set forth, and all of the rights and liabilities appertaining thereto,—at the request of the defendants, bargained with the said defendants for the purchase of certain fuel oil, the said agreement and promises of the said defendants and the said N. & G. Taylor Company, copartners, being set down in writing, in the following words and figures, to-wit:

"New York, November 1, 1916.

N. & G. Taylor Company,
Philadelphia, Penna.

60 Gentlemen:—

In reply to your letter of the 31st ult., and confirming conversation with the writer this date, we have entered your order for

2 Tank cars Fuel Oil, Gravity 30-32 FOB refinery, freight allowed to Cumberland, Md. @ 5.05c per gallon, terms 1%-10 days, 30 days net.

Subject to our ability to secure tank cars, we submit as follows:—

Proposal to furnish the N. & G. Taylor Company, Philadelphia, Pennsylvania, with Fuel Oil at their Cumberland, Md., plant.

Quantity: Their requirements estimated at 1,200,000 gallons, to be taken out commencing November 1, 1916, and ending June 30th, 1917, in fairly equal monthly quantities.

Specifications: The gravity of this oil shall be between 30 and 32 Baume.

Price: The price shall be 5½c per gallon f. o. b. tank cars refinery with freight allowed to Cumberland, Md.

Terms: 1% net amount of invoice for cash in ten days from date of invoice, or 30 days net.

Shipments: Shipments to be made in tank cars of eight to ten thousand gallons capacity, with the understanding that they furnish us at least 30 days advance notice of date of shipment.

Rates: This delivered price made subject to freight rates now in effect. Any change in rates, whether advance or decline to revert to the buyer.

War Tax: This price is not subject to include any tax that the Government may impose on the goods herein described. Should there be any such tax it will necessarily have to be added to the price above quoted.

Acceptance. This proposal is submitted in duplicate, the prompt acceptance of which shall constitute a contract between us for the sale and shipment, purchase and acceptance of above goods, same subject to our ability to furnish tank cars; also with the understanding that the two cars for which we have entered your order will be representative of quality of the goods that will be shipped.

61 Respectfully submitted,

ANDERSON & GUSTAFSON

By B. H. KLASE (?)

Dated at _____ this _____ day of _____ 1916.

Accepted:

N. & G. TAYLOR CO.

By _____."

But although the said times for the delivery of said oil have long since elapsed, and the plaintiff alleges that it and its predecessor, N. & G. Taylor Company, copartners, have always kept, performed and complied with each and every term and condition of said contract in manner and form as therein required and have always been ready and willing to accept and receive the said oil in accordance with the said contract and pay for the same at the price aforesaid, to-wit, at the price of five and a quarter cents (5¼c) for each gallon thereof, f. o. b. tank cars at refinery, with freight allowed to Cumberland, Maryland, as aforesaid, and although the said defendants could have secured tank cars in sufficient numbers to make the said deliveries as they had heretofore promised, if they had exercised due diligence; yet the said defendants did not nor would within the time aforesaid, either prior to February first, 1917 to N. & G. Taylor Company, copartners, or afterwards to N. & G. Taylor Company, Incorporated, deliver the said oil, (except that the said defendants delivered to the N. & G. Taylor Company, copartners, four tank cars of oil, amounting to approximately forty thousand (40,000) gallons thereof, at the said plant of N. & G. Taylor Company, copartners, acquired by the said plaintiff February first, 1917, at Cumberland, Maryland, aforesaid) but refused so to do; whereby the said plaintiff itself and as successor to N. & G. Taylor Company, a partnership, has been subjected to great loss, which it sustained and would not

62 have suffered if the said oil had been delivered in accordance with the promises of the said defendants as aforesaid.

To the Damage of the plaintiff in the sum of Forty-five Thousand Dollars ($45,000.00) and, therefore, it brings its suit, etc.

GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Plaintiff.

63 State of Illinois } ss.
County of Cook }

H. N. TAYLOR, being first duly sworn on his oath, says, that he is President of N. & G. Taylor Company, a corporation, organized and existing under the laws of the State of Maryland.

That on the first day of February, 1917, the said N. & G. Taylor Company was incorporated and started to do business;

That under and by virtue of a partnership agreement between H. N. Taylor and William W. Justice, Jr., doing business as N. & G. Taylor Company and N. & G. Taylor Company Incorporate, the said copartnership ceased to exist and was terminated on the 31st day of January, 1917, and was succeeded by N. & G. Taylor Company Incorporated, which began business on February 1st, 1917, and which said corporation took over "the entire right, title and interest, property and assets of every kind and description, including good will and trade marks of the firm of N. & G. Taylor Company, subject to all liabilities of said firm, which liabilities are to be assumed by N. & G. Taylor Company, Incorporated," and

That included in the said assets and liabilities so
64 taken over by the said N. & G. Taylor Company, Incorporated, was the contract set forth in the said first and fifth counts of the said declaration; which said assets included a right of action against Anderson and Gustafson for breach of contract from the 1st of November, 1916, or such time as the contract went into force, to the 31st day of January, 1917, and a liability upon the part of the said N. & G. Taylor Company, Incorporated, to take from the said Anderson and Gustafson the requirements of the said Company for fuel oil to and including June 30th, 1917, under and in accordance with the terms of the said contract.

H. N. TAYLOR
President, N. & G. Taylor Company, Incorporated.

Subscribed and sworn to before me this 14th day of May, A. D. 1924.

(Seal) JOHN S. STEVENS
Notary Public.

(Endorsed) File May 14, 1924 John H. R. Jamar, Clerk.

65 And afterwards on, to wit, the 14th day of May, 1924, this matter coming on to be heard, the following order was entered by the Court:

66 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Wednesday, May 14, 1924.

Present: Honorable Adam C. Cliffe, District Judge.

N. & G. Taylor Company, Inc., a a corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners. } No. 32831.

ORDER

Upon motion, leave is hereby granted Plaintiff to file Amended first and fifth Counts to the Amended Declaration, to which ruling the Defendants except.

It Is Further Ordered by the Court that the Pleas of the Defendants, heretofore filed to the first and fifth Counts of the Plaintiff's Amended Declaration as Amended, stand as Pleas to the Amended first and Fifth Counts of the Amended Declaration as Amended.

And It Is Further Ordered that the Defendants have leave to file instanter further Pleas of the Statute of Limitations, and the Plaintiff is ruled to reply to said additional Pleas instanter.

And now this cause comes on for further trial before a

Jury, heretofore duly empanelled and sworn, and, thereupon, the Defendants, at the close of the Plaintiff's evidence, move the Court for an instructed verdict, which motion of the Defendants is granted, to which ruling the Plaintiff excepts, and, thereupon, the Court instructs the Jury to find the
67 issues in favor of the Defendants, and thereupon the Jury return in open Court their verdict finding the issues for the Defendants, to which the Plaintiff excepts. Thereupon, the Plaintiff moves the Court for a new trial, which motion is entered and continued.

68 And afterwards on, to wit, the 6th day of January, 1925, this matter coming on to be heard, the following order was entered by the Court: Entered 192

69 In the District Court of the United States

For the Northern District of Illinois

Eastern Division.

Tuesday, January 6, 1925.

Present: Honorable Adam C. Cliffe, District Judge.

N. & G. Taylor Company, Inc., a corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners,
} No. 32831.

ORDER.

Now this cause comes on this day to be heard upon motion of the Plaintiff for a new trial of this cause herein, and the Court having heard the arguments of counsel, and being now fully advised in the premises,

It Is Ordered that the motion of the Plaintiff for a new trial be and it is hereby overruled, to which ruling the Plaintiff excepts. Thereupon, the Plaintiff moves the Court in arrest of Judgment, which motion is heard and overruled, to which ruling the Plaintiff's excepts.

It Is Therefore Considered and Adjudged by the Court that the Plaintiff take nothing by its Declaration, and that the Defendants do have and recover herein its costs to be taxed against the Plaintiff for which let execution issue, to which action of the Court the Plaintiff excepts.

Upon motion of the Plaintiff, It Is Ordered by the Court that thirty days be granted to the Plaintiff in which to file its Bill of Exceptions, and Bond in the sum of Two Hundred Fifty Dollars ($250.00) with surety to be approved by the Court.

83 And on to wit: the 21st day of February, A. D. 1925, there was filed in the Clerk's office of said court a certain Bill of Exceptions, in words and figures following, to wit:

84 (Endorsed): Filed Feb 21 1925 at ____ o'clock ____ M. John H. R. Jamar, Clerk.

85 United States of America
Northern District of Illinois } ss.

In the District Court of the United States

For the Northern District of Illinois

Eastern Division at Chicago

May Term, A. D. 1924.

N. & G. Taylor Company, a Maryland Corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners,
} General No. 32831.

Be it remembered that heretofore, to wit, on the 7th day of May, A. D. 1924, being one of the days of said term of said court, before the Honorable Adam C. Cliffe, one of the judges of said court, sitting on the common law side thereof, and a

jury, this cause came on for trial upon the pleadings heretofore filed herein.

Messrs. Good, Childs, Bobb & Wescott, and Mr. Edwin A. Lucas, appeared for the plaintiff;

Messrs. Alden, Latham & Young, appeared for defendants.

And thereupon the plaintiff, to maintain the issues on its part, introduced the following evidence, to wit:

86 HOLLINGSHEAD N. TAYLOR, witness for plaintiff, being first duly sworn, upon direct examination by Mr. Beebe, testified as follows:

Name, Hollingshead N. Taylor. Business, manufacturer of tin plate and steel bars. Age, 45. In this business 24 years. General offices, Philadelphia; Manufacturing plant, Cumberland, Maryland. Other office, Chicago, for many years. Licensed in Illinois. Steel bar plant and tin plate plant, separate units. Steel bar plant covers three or four acres. In September and October, 1916, were using natural gas in steel bar plant. Changed form of fuel in open hearth furnaces November, 1916. Substituted fuel oil. Knew supply of natural gas was failing and in fall of 1916 started to inform selves as to use of fuel oil and prepared to put in equipment to run furnaces on fuel oil when gas supply failed. Sent out large number of inquiries as to quotations, prices of fuel oil; also for general information as to suitability of oil, what kind best suited for purposes. Sent out numerous inquiries different dates as far back as September for quotations and general information to get idea of costs but not because then ready to purchase. Did not know when would be ready to purchase. Had to wait and see when gas would fail. Sent inquiries in September to Anderson & Gustafson. Were to use fuel oil in open hearth furnaces. Such a furnace takes pig iron, steel scrap and purifying agencies such as limestone, flourspar and other chemicals. These charged into open hearth subjected to high temperature, melted thoroughly, refined into steel. Other two basic methods of making steel are Bessemer and Crucible processes. Open hearth more widely used. To heat furnace must flow flame of
87 some sort of fuel through furnace to bring open hearth to proper temperature.

Mr. Beebe: Offer as Plaintiff's Exhibit 1 for identification, letter of September 11, 1916, from Anderson & Gustafson, to N. & G. Taylor Company, Philadelphia.

Mr. Young: Object.

The Court: Wasn't it merged into the contract?

Mr. Beebe: Eventually, but except one thing. There is one thing here that says they knew the class of furnace.

The Court: Objection sustained.

To which ruling plaintiffs then and there excepted.

Which said letter is as follows:

88 PL. EX. 1 IDEN.

C. A. Gustafson (A & G Cut) John A. Anderson

Anderson & Gustafson
Petroleum and Its Products
Woolworth Building
Telephone Barclay 5248
New York

Branch Offices:
Tulsa Oklahoma Office
Daniel Building
Kansas City Mo. Office
Finance Building

General Offices
Transportation Building
Chicago

September 11, 1916.

N. G. Taylor Company,
Philadelphia, Penna.

Gentlemen:—

Subject to prompt acceptance we quote you Fuel Oil, gravity 30-32, Baume, FOB tank cars refinery, at 5.05c per gallon, freight allowed to Cumberland, Md.

The approximate tests on this oil are as follows: Flash, 200, Fire 250, sulphur contents less than 1/10 of 1%, heat units 19500 B.T.U.'s per lb. *

With reference to the names of some of the steel concerns who use our oil successfully in open hearth furnaces, we have requested our general office at Chicago to furnish you this information promptly. We have quite a number of large con-

* The above quotation is made on your estimated requirements not to exceed 150,000 gallons per month from date to July 1, 1917.

tracts for steel concerns in that section, but this information is not readily accessible at this office.

We are in position to make prompt shipment, and trust that we may have the favor of a trial order.

Thanking you for the inquiry and awaiting your further pleasure, we are

Yours very truly,

ANDERSON & GUSTAFSON,
By B. H. KLUSE.

BHK/B

(Time Stamp) Received N. & G. Taylor Co. Philadelphia. Sep 12 1916 3:42.

89 Mr. Beebe: Offer as Plaintiff's Exhibit 2, letter of September 22, 1916, from Anderson & Gustafson to N. & G. Taylor Company, Philadelphia.

Mr. Young: Object for the same reason.

The Court: Sustained.

To which ruling of the Court, plaintiffs then and there excepted, which said letter is as follows:

90 PL. EX. 2 IDEN.

C. A. Gustafson (A & G Cut) John A. Anderson

Anderson & Gustafson
Petroleum and Its Products
Woolworth Building
Telephone Barclay 5248
New York

Branch Offices:
Tulsa Oklahoma Office
Daniel Building
Kansas City Mo. Office
Finance Building

General Offices
Transportation Building
Chicago

September 22, 1916.

(Stamped) Answered Sep 25 1916 By M. S.

N. G. Taylor Company,
Philadelphia, Penna.

Gentlemen:—

Further referring to ours of the 11th instant quoting you prices on Fuel Oil, we wish to state for your information that we have sold Fuel Oil to quite a number of concerns who have

used it in open hearth furnaces, among which we can refer you to Federal Trust Company, Deere & Co. and Detroit Steel Products Co.

We should like very much to hear from you with reference to our quotations of the 11th instant as to what our prospects are. Can you not at least favor us with a trial order for a tank or two?

Awaiting your further pleasure, we are

Yours very truly,

ANDERSON & GUSTAFSON,

BHK/B By B. H. KLUSE.

(Time Stamp) Received N. & G. Taylor Co. Philadelphia. Sep 23 1916 7:45.

91 Witness (continuing): Had conversation October 30th or November 1st by telephone with New York Representative of Anderson & Gustafson at New York office.

Mr. Beebe: Offer as Plaintiff's Exhibit 3 for identification letter November 1, 1916, from Anderson & Gustafson to N. & G. Taylor Company, Philadelphia.

Witness: I first saw Plaintiff's Exhibit 3 on November 3, 1916, it being confirmation of contract arranged by telephone conversation with New York representative on that date.

Mr. Beebe: Did you make that contract over the telephone on that date?

Mr. Young: Object.

The Court: Sustained.

To which the plaintiffs then and there excepted.

Mr. Beebe: Offer in evidence letter of November 1, 1916 from Anderson & Gustafson to N. & G. Taylor Company. Said document was received in evidence marked Plaintiff's Exhibit 3 and is as follows:

92 PL. EX. 3 IN EVID. Pl

C. A. Gustafson (A & G Cut) John A. Anderson
Anderson & Gustafson
Petroleum and Its Products
Woolworth Building
Telephone Barclay 5248
New York

Branch Offices:
Tulsa Oklahoma Office
Daniel Building
Kansas City Mo. Office
Finance Building

General Offices
Transportation Building
Chicago

November 1, 1916.

N. & G. Taylor Company,
Philadelphia, Penna.

Gentlemen:—

In reply to your letter of the 31st ult., and confirming conversation with the writer this date, we have entered your order for

2 Tank Cars Fuel Oil, Gravity 30-32, FOB refinery, freight allowed to Cumberland, Md., @ 5.05c per gallon, terms 1%—10 days, 30 days net.

Subject to our ability to secure tank cars, we submit as follows:

Proposal to furnish the N. & G. Taylor Company, Philadelphia, Pa., with Fuel Oil at their Cumberland, Md. Plant.

Quantity: Their requirements estimated at 1,200,000 gallons to taken out commencing November 1, 1916, and ending June 30th, 1917, in fairly equal monthly quantities.

Specifications: The gravity of this oil shall be between 30 and 32 Baume.

Price: The price shall be 5¼c per gallon f.o.b. tank cars refinery with freigh tallowed to Cumberland, Md.

Terms: 1% net amount of invoice for cash in ten days from date of invoice, or 30 days net.

Shipments: Shipments to be made in tank cars of eight to ten thousand gallons capacity, with the understanding that they furnish us at least 30 days advance notice of date of shipment.

Rates: This delivered price made subject to freight rates now in effect. Any change in rates whether advance or decline to revert to the buyer.

(Time Stamp) Received N. & G. Taylor Co. Philadelphia. Nov 3 1916 2:18.

93 War Tax: This price is not subject to include any tax that the Government may impose on the goods herein described. Should there be any such tax it will necessarily have to be added to the price above quoted.

Acceptance: This proposal is submitted in duplicate, the prompt acceptance of which shall constitute a contract between us for the sale and shipment, purchase and acceptance of above goods, same subject to our ability to furnish tank cars; also with the understanding that the two cars for which we have entered your order will be representative of quality of the goods that will be shipped.

Respectfully submitted,

ANDERSON & GUSTAFSON,
By B. H. KLUSE.

Dated at _____ this _____ day of _____ 1916

Accepted:
N. G. TAYLOR CO.
By _____

BHK/B

94 Witness: Confirmation called first for shipment two cars. Shipped latter part of November. One car shipped at price of 5.05 per gallon. We treated contract as in effect giving instructions for shipments of cars under contract.

Mr. Beebe: Present as Plaintiff's Exhibit 4, for identification, copy of letter November 13, 1916, from N. & G. Taylor Company to Anderson & Gustafson, Woolworth Building, New York.

Witness: I wrote the letter and sent it by mail to Anderson & Gustafson, Woolworth Building, New York.

Plaintiff's Exhibit 4 was then received in evidence and is as follows:

94½ PL. EX. 4 EVID.

, November 13, 1916.

Anderson & Gustafson,
Woolworth Building,
New York, N. Y.

Dear Sirs:

Replying to your letter of November 9th, it is important

that we have five more cars of Fuel Oil shipped as quickly as possible. Will you kindly arrange to rush these forward to our Cumberland Works, advising us by return mail when we may expect them to go forward?

We are ready to forward signed copy of the contract as soon as we hear from your Chicago office.

Very truly yours,

C-29.

95 Thereupon Mr. Beebe read Plaintiff's Exhibits 3 and 4 to the Jury.

Mr. Beebe: Offer Plaintiff's Exhibit 5 for identification, it being Western Union telegram dated November 17 from Anderson & Gustafson, Chicago, to N. & G. Taylor Company, Philadelphia.

Witness: First saw it November 18, 1916, it being received in Philadelphia office from general office of Anderson & Gustafson, over Western Union.

Said Exhibit 5 was thereupon received in evidence and is as follows:

96 PL. EX. 5 EVID.

Plaint
hibi

Western Union Telegram.

Received at N. W. Corner 15th and Chestnut Streets Philadelphia Always Open

9588

E190CH SJ 26 NL

Chicago Ills Nov 17-1916

(Stamped) 1875

N and G Taylor Co
Philadelphia Penna

Five Cars Will Be Shipped Out From Refinery to You Either Today or Tomorrow Car Numbers Will Be Wired You and Cars Traced Vigorously to Destination

ANDERSON AND GUSTAFSON

756P

(Time Stamp) Received N. & G. Taylor Co. Philadelphia. Nov 18 1916 8:45.

97 Mr. Beebe read plaintiff's Exhibit 5.

Mr. Beebe: Offer Plaintiff's Exhibit 6, being carbon copy of letter dated November 15, 1916, from N. & G. Taylor Company to Anderson & Gustafson, Woolworth Building, New York.

Witness: I wrote the letter, know I did so by my symbols and stenographer's numeral thereon.

Said letter dated November 15, 1916, from N. & G. Taylor Co. to Anderson & Gustafson, Woolworth Bldg., New York, marked Plaintiff's Exhibit 6, was received in evidence, and is as follows:

98 PL. EX. 6 IN EVID.

9588

, November 15, 1916.

Anderson & Gustafson,
Woolworth Building,
New York, N. Y.

Dear Sirs:

Replying to your letter of November 14th, it will be a serious matter if the five cars of Fuel Oil are not shipped promptly, as we are now approaching the time when we shall have to start our furnaces on oil, and we should be making some progress in getting in the November quota upon our contract with you. Please instruct your principals, therefore, to mark these orders "rush", as we cannot start our furnaces on oil until this additional supply comes in.

We are depending upon you to keep us properly supplied under this contract, and you will cause us very serious loss if for any reason you fail to make deliveries. We ask you to spare no effort to get matters lined up so that supplies will be coming forward to us regularly through the winter months.

Very truly yours,

C-29.

99 Mr. Beebe read plaintiff's Exhibit 6 to Jury.

The Court: When was other car shipped?

Mr. Beebe: Only one was shipped at that price, two prices stated—one at 5.05 and one at 5.25.

Mr. Young: Evidence will show both cars shipped and three on other order.

Mr. Beebe: One at 5.05 and other 5.25.

Mr. Beebe presented as Plaintiff's Exhibit 7 letter November 22, 1916, from N & G Taylor Company to Anderson & Gustafson, Woolworth Building, New York, which was received in evidence, and is as follows:

100 PL. EX. 7 EVID. Plaintiff's Exhibit

Anderson & Gustafson,
Transportation Bldg.,
Chicago, Ill.

, November 22, 1916.
Dic. 11-21-16.

Anderson & Gustafson,
Woolworth Building,
New York, N. Y.

Dear Sirs:

Kindly make arrangements at once to start deliveries of Fuel Oil under our contract with you, at the rate of three cars every two days, commencing December 1st, and continuing at this rate until further notice from us. The greater part of the November quota of our contract is overdue, and it is very important that deliveries be brought up to date as promptly as our storage capacity and requirements will permit.

Please give this matter your immediate attention and acknowledge receipt of these instructions by return mail.

We are now depending upon our contract with you to keep our Works going, and we need hardly remind you that any failure to keep us properly supplied would be very disastrous indeed.

We have not yet received the car numbers as promised in your telegram of November 17th, covering the five cars to be shipped on that date or the day following. We sincerely hope that nothing has occurred to delay shipment of these cars, as we are counting upon receiving them in the course of the next week or ten days at Cumberland.

Very truly yours,

C-29.

101 Mr. Beebe read Plaintiff's Exhibit 7 to Jury.
Witness: Contract signed November 21st.

Mr. Beebe: Offer in evidence Plaintiff's Exhibit 7, carbon copy of letter dated November 29, 1916, from N. & G. Taylor Company to Anderson & Gustafson, Transportation Bldg., Chicago.

Witness: I signed the original of the letter.

The document was received in evidence, marked Plaintiff's Exhibit 8, and is as follows:

102 PL. EX. 8 IN EVID.

Anderson & Gustafson,
Woolworth Bldg., New York, N. Y.

, November 27, 1916.

Anderson & Gustafson,
Transportation Building,
Chicago, Illinois.

Dear Sirs:

Confirming our telegram of this morning, we are very much concerned over the fuel oil situation, and your failure so far to start proper deliveries to us under our contract with you.

You advised us definitely on November 17th, in your telegram of that date, that five cars would be shipped on that date, or the day following, and we are very much disappointed to learn from your letter of November 25th that apparently this was not done.

We have changed our Open Hearth furnaces over from natural gas, to burn fuel oil, through the winter months, and it is of vital importance that a steady supply of oil be started to us immediately at the rate of three cars every two days, continuing at this rate until further notice from us.

Apparently you have shipped us only one car so far against our November quota of 150,000 gallons. We are depending upon you to keep us going, and if through an error in your calculations you are oversold, you ought to assume any loss we may suffer by being obliged to purchase a supply on the open market for quick shipment to keep us going.

Very truly yours,

C-29.

103 Mr. Beebe then read plaintiff's Exhibit 8 to jury.

Mr. Beebe: Offer in evidence plaintiff's Exhibit 9, being carbon copy of Postal telegraph dated November 27, 1916, from N. & G. Taylor Company to Anderson & Gustaf-

son, Transportation Bldg., Chicago. Mr. Beebe read it to jury.

Said document received in evidence and is as follows:

104 PL. EX. 9 IN EVID.

Plaintiff's Exhibit 9 and

Confirmation of Telegram
From
N. & G. Taylor Co.

Postal 10.05 A.M. 9588

Philadelphia, Nov. 27, 1916

Anderson & Gustafson,
Transportation Building,
Chicago, Ill.

Referring your telegram seventeenth we have been counting on these five cars where are they

N. & G. TAYLOR COMPANY
(B)

Full Pay

105 Mr. Beebe presented carbon copy of letter dated December 1, 1916 from N. & G. Taylor Company to Anderson & Gustafson, Transportation Bldg., Chicago.

Witness: I dictated the letter and sent it.

It was received in evidence and marked Plaintiff's Exhibit 10, and is as follows:

106 PL. EX. #10 IN EVID.

, December 1, 1916.

Anderson & Gustafson,
Transportation Building,
Chicago, Ill.

Dear Sirs:

Replying to your letter of November 29th, we note that you are shipping us two additional cars, and we sincerely hope that by the time this letter reaches you, you will have been able to get additional shipments on the way to us.

We know that car service conditions are far from ideal, but if it is difficult for us to understand why this should have been so serious as to cause practically entire suspension of shipments to us for nearly one month's time, especially as the car shortage does not seem to interfere with the supply of premium oil, which is offered us from a number of sources

for prompt shipment. It seems hardly conceivable that this extraordinary failure in the car supply has suddenly developed since our purchase was made. We feel that the small quantity shipped so far upon the contract hardly represents a fair allotment to us. We placed the business with you in good faith, depending upon your service to keep our Works in operation. Our oil requirements will be running heavy for the next two or three months, and it is vitally important to us to have regular supplies coming along.

We repeat that the supply of cars for shipments of premium oil seems to be ample, judging from the offers made us by four or five other larger sellers, so you can readily see the situation is one that is not very satisfactory to us, with the prospect of being obliged to pay high prices for quick shipments to make up our deficiency while deliveries under our contract are held up. The matter of car supply is not so entirely beyond the control of the shipper that he is justified in throwing up his hands and offering it as a reason for non-delivery.

We are facing the probability of very heavy losses unless you can start regular supplies under our contract at the rate mentioned in our recent correspondence, namely—three cars every two days. Please consider yourselves as our representatives, acting in our interests, and if necessary make exceptions to take care of us, keeping us posted on the situation from day to day.

Very truly yours,

C-29.

107 Mr. Beebe read Plaintiff's Exhibit 11 to jury, it being carbon copy of letter November 29, 1916, from N. & G. Taylor Company to Anderson & Gustafson, Chicago, Illinois.

Witness: I dictated the letter and sent it.

It was received in evidence marked Plaintiff's Exhibit 11, and is as follows:

108 PL. EX. #11 IN EVID.

November 29, 1916.

Anderson & Gustafson,
Chicago, Ill.

Dear Sirs:

We are naturally very much concerned indeed over the contents of your letter of November 27th, as there was no

idea in our mind, at the time the contract was placed in your hands, that you would be unable to take proper care of us. We cannot run a steel plant without steady supplies, and you can readily understand that we do not view with any satisfaction the prospect of being obliged to go into the open market and buy premium oil to keep ourselves going.

We realize that the car situation is not entirely under your control, but we feel very strongly that you should make a special effort to accommodate us as a new customer, and to make up the large deficiency due us.

We ask you, therefore, to take this matter up urgently on our behalf, advising us by return mail, if possible, what you expect to be able to do for us over the course of the next week or two.

Very truly yours,

N. & G. TAYLOR Co.

C-19

109 Mr. Beebe presented Plaintiff's Exhibit 12, carbon copy of letter dated December 9, 1916, from N. & G. Taylor Company to Anderson & Gustafson, Transportation Bldg., Chicago, Ill.

Witness: I dictated and sent the letter.

It was received in evidence, marked Plaintiff's Exhibit 12, and is as follows:

110 PL. EX. #12 IN EVID.

Plain
hib

9588 ,December 9, 1916.

Anderson & Gustafson,
Transportation Bldg.,
Chicago, Illinois.

Dear Sirs:

We are confronted with a puzzling situation with reference to our oil supply, and are writing you frankly about it, in the hope that you can co-operate with us to straighten it out.

We have run up against an unexpected check in getting our fuel oil equipment going, as we have found after a short run that we cannot operate successfully with steam, and have been obliged to make arrangements to change over as quickly as possible to the use of compressed air to atomize our oil. It will probably be two weeks before we are ready to start up again with oil, and we want shipments suspended for that

length of time. Just as soon as we are ready to start up again, we shall want shipments resumed at the rate of three cars every two days, and we shall be in a serious predicament if you cannot maintain shipments to us at that rate.

Will you, therefore, take the opportunity of this interval to arrange matters so that you can be reasonably sure of getting supplies forward to us at this rate when we give you the word.

We want to spare you the possibility of having any tank cars held on demurrage at Cumberland, and therefore ask your co-operation with us.

We have telegraphed you today briefly to this effect, so that you might divert shipments elsewhere for the present.

Awaiting your reply, we are,

Very truly yours,

C-29.

111 Mr. Beebe thereupon read Plaintiff's Exhibit 12 to the jury.

Mr. Beebe: Offer carbon copy of telegram dated December 18, 1916 from N. & G. Taylor Company to Anderson & Gustafson, Transportation Bldg., Chicago.

Witness: It was the office file copy of telegram sent that date by Postal Telegraph at 10:15 A.M.

The document was received in evidence marked Exhibit 13, and is as follows:

112 PL. EX. #13 IN EVID.

Confirmation of Telegram
From
N. & G. Taylor Co.

Postal 10.15 A.M. 9588

Philadelphia, Dec. 18, 1916

Anderson & Gustafson,
Transportation Building,
Chicago, Ill.

Resume shipments fuel oil immediately at rate of three cars every two days Please do all you can to take care of us and wire us our expense number and routing of each of first twelve cars as shipped.

N. & G. Taylor Company

Full Pay (B)

113 Mr. Beebe read Plaintiff's Exhibit 13 to the jury.

Mr. Beebe: Offer in evidence carbon copy of letter January 18, 1917, from N. & G. Taylor Company to Anderson & Gustafson, Transportation Bldg., Chicago, Illinois.

Witness: I sent the letter and signed it.

It was received in evidence and marked Plaintiff's Exhibit 14, and is as follows:

114 PL. EX. #14 IN EVID.

Plain
hib

9588 , January 18, 1917.

Anderson & Gustafson,
Transportation Building,
Chicago, Ill.

Dear Sirs:

We beg to notify you that we have been advised from a number of reliable sources that there are tank cars available for your use in shipping us oil in pursuance of our contract dated November 1st, 1916, and that we do not recognize as valid your statement that you are excused from shipping oil to us by reason of your inability to secure or furnish tank cars.

We shall expect to hold you liable for the amount of loss which we may incur in securing oil elsewhere suitable to our needs, or, if we are not able to obtain the same, for damages in any way suffered by us by reason of your default under your contract.

Very truly yours,

HSD/29.

115 Mr. Beebe then read Plaintiff's Exhibit 14 to the jury.

Mr. Beebe: Offer in evidence as Plaintiff's Exhibit 15, carbon copy of letter March 20, 1917, from N. & G. Taylor Company to Anderson & Gustafson, Transportation Bldg., Chicago.

Witness: I signed the letter and sent it.

Document received in evidence, marked Plaintiff's Exhibit 15, and is as follows:

116 PL. EX. #15 IN EVID.

9588 , March 20, 1917.

Anderson & Gustafson,
Transportation Building,
Chicago, Ill.

Dear Sirs:

We have been in correspondence for many weeks in reference to your contract to supply us with Fuel Oil, on which you have lamentably failed to give satisfaction.

As we have told you, we have made considerable inquiries as to the car situation over the Oklahoma field, and our advices do not bear out your reiterated statements that your failure to supply us with oil was due solely to the inability to secure tank cars.

As we have advised you, we have been compelled by reason of your neglect to furnish us oil, to secure a supply from other outside sources and have noted from time to time the record of the difference in price, a memorandum which to date is as follows:

6125 Gals.	@	1-3/4¢	$ 107.18	
140575 "	@	3-1/4¢	4568.68	
71680 "	@	1-1/4¢	896.00	
45186 "	@	4-1/4¢	1920.40	
46242 "	@	4-1/2¢	2080.89	
46022 "	@	.0036¢	165.68	
94613 "	@	2.36¢	2232.87	$ 11,971.70

Your performance in delivering oil has been so very far below anything that could be called reasonable, that we have been convinced that there was no prospect of receiving from you any considerable proportion of your contract supply during the present spring, and in view of our urgent need of Fuel Oil for our Works, we have, therefore, taken steps to secure a supply from other sources, although at an advanced rate.

We advise you of this course on our part at this time, so that you may not ship to us any further oil. Of course, you will understand that our action in this regard was not taken in any way as relieving you from your obligation under the contract, or as an acknowledgment by us of the propriety of your excuse for your failure to live up to the terms of the contract. We have purchased this outside oil solely because

it was absolutely essential to us to have a supply, and in the reduction of our damages, caused by your failure to deliver us the oil.

As we have previously advised, we intend to hold you responsible for the difference in price, and the other damages which we have sustained by reason of what we believe to be your unwarranted failure.

There have not yet been called to our attention facts which in our opinion warranted you in restricting shipments to us to such a very small percentage of the contract requirements.

If a representative of yours is in this vicinity, it might be well for us to have a frank discussion of this whole matter before any further steps are taken. Your Mr. Beroth was here some weeks ago, but nothing came of his visit, and as you wrote subsequently, the situation was left unsettled by it.

Very truly yours,

HSD/29.

117 Witness: We supplied ourselves with oil for fuel for plant by purchases from other people.

Mr. Beebe: I wish to file petition for production of certain specific books and papers.

118 CHARLES A. GUSTAFSON, Witness for plaintiff, first duly sworn upon Direct Examination by Mr. Beebe, testified as follows:

Name, Charles A. Gustafson. Business, petroleum worker. One of defendants. Was served with copy of subpoena duces tecum on Monday, May 5, 1924. Have not produced in court what called for in subpoena. Haven't all the records. Mr. Young has all records I have. Have produced no books. We have books of account, ledgers, journals, cash books, we had at that time. Have no books showing amount of oil contracted for and delivered during that period of time. Have books showing customers to whom sold and delivered oil during that time. They show date of invoices and amount in dollars and cents—books of account. Such books will not tell what oil was sold and delivered during that time. Received no commission. Bought and sold outright. Can tell number of cars bought and sold but not whether gasoline fuel oil or distillates. Know whether it was sale of fuel oil or distillates but can't tell from books. Kept an order book in 1916. Do not

have it. Kept shipment and delivery record. Do not have it. Did not keep in book form. Kept loose leaf. Destroyed at time partnership went out of business shortly afterward. In 1919. Same as to shipment and delivery record. Had no tank car books at that time because had few tank cars. Kept track of tank cars leased by loose leaf system. Had no book. Have no letter files showing business done during that period of time. Letter files destroyed. Have books of account, cash book, journals and ledgers. Instructed clerk to send and so sent to Alden, Latham & Young all papers, correspondence, copies of invoices, etc., that had reference to transaction with N. & G. Taylor Company. Partnership went out of business in 1919. Corporation formed which succeeded to the business. Name has changed twice since then. Offices moved
119 two or three years ago. Outside of keeping books of account, journals, ledgers and cash books, kept none of old partnership records, particularly pertaining to N. & G. Taylor & Company. Those old records were destroyed. All papers and letters relating to this particular transaction taken out before that and sent to Mr. Young. All that I have now relating to old business in 1916 and 1917 of the partnership are ledgers, journals, cash books.

Mr. Young: If they are of any benefit or material or will show anything, have no objection to producing them.

Mr. Beebe: They are. Would like to have them all.

Court directed production.

Mr. Young: Will produce. Will send down and have them here by 2 o'clock. Have been stored and not in use for years.

120 HOLLINGSHEAD N. TAYLOR, Resumed stand for plaintiff and on Direct Examination by Mr. Beebe, testified further, as follows:

President of N. & G. Taylor Company. Duties general. Charge of purchasing, sales of steel, finances, relations with banks and such general duties. Have only three executives therefore varied line of duties between them. Cumberland, Maryland. In far, western end of state, west of Alleghany's in what is called Pittsburgh district. On outer edge of Pittsburgh district some 300 miles west of Philadelphia, over the line from West Virginia. On B & O, Western Maryland and Pennsylvania Railroads. Plant located there. Is Maryland

corporation. Plant at Cumberland. General offices at Philadelphia for 115 years.

Mr. Beebe: Offer as Plaintiff's Exhibit 16 original of letter dated November 6, 1916, from Anderson & Gustafson, to N. & G. Taylor Company, Mariner & Merchant Bldg., Philadelphia.

Witness: Have seen it before. In 1916. Received it November 7 in regular course of business through United States mail.

Document received in evidence, marked Plaintiff's Exhibit 16, as follows:

121 PL. EX. 16 IN EVID.

Plaintiff's Exhibit 16

(Letterhead of Anderson & Gustafson, Petroleum and its Products, New York.)

November 6, 1916.

N. & G. Taylor Co.,
Mariner & Merchant Building,
Philadelphia, Penna.

Gentlemen:—

We are in receipt of yours of the 3rd instant (dictated the 1st instant) and in reply wish to state that on the 1st we forwarded you our letter in duplicate submitting our proposition as outlined in same.

Up to the present writing we have not received your acceptance of same, and would request that you give this your prompt attention.

Yours very truly,

ANDERSON & GUSTAFSON
By B. H. KLVAL

BHK/B

(Stamp) Received, N. & G. Taylor Co., Philadelphia, 9 a. m., Nov. 7, 1916.

122 Mr. Beebe read Plaintiff's Exhibit 16 to jury.

Mr. Beebe: Offer as Plaintiff's Exhibit 17 copy of letter dated November 6, 1916, from N. & G. Taylor Co. to Anderson & Gustafson, Woolworth Building, New York.

Mr. Young: Object. Letter was written November 6, 1916, and merged in contract.

Court: Objection sustained.

Letter was marked Plaintiff's Exhibit 17 for identification, and is as follows:

123 PL. EX. 17 FOR IDEN.

November 6, 1916.
Dic. 11-4-16.

Anderson & Gustafson,
Woolworth Building,
New York, N. Y.

Dear Sirs:

We now have before us your favor of the 1st inst., embodying contract covering our purchase of Fuel Oil from you, which is in accordance with our understanding.

Although the contract calls for our estimated requirements, not to exceed a certain maximum, nevertheless, in fairness to you, we should like to caution you that our requirements are not likely to run uniform throughout the period. During December, January and February, we are likely to need the maximum quantity of 150,000 gallons monthly, but for the other months our requirements are rather uncertain, and we may find that we shall need little, if any, of that Oil during May and June. It is practically certain that we shall carry over enough oil from the mid-winter months to run us through the early spring, so that we do not object to making the contract call for November 1st to March 31st, if that is agreeable to you.

If, however, you are satisled to leave the contract as it stands, giving us the privilege of taking the entire quantity if we find later that we need it, that will be satisfactory to us, but as we have explained to you, we have never before used oil as a fuel, and our probable use of it is so uncertain that your stipulation as to fairly equal monthly quantities might be impossible for us to carry out.

When we have the use of this Fuel standardized later, at our Works, we can then cover this point more closely, but for the present, prefer that the contract agree with our understanding following our telephone conversation with you, namely—that you would cover us upon our requirements up to a certain maximum, whatever they might prove to be, and we in return will agree to order only from you.

We hope that the first two cars will be shipped shortly, if not already on the way, and remain,

Very truly yours,

C-29.

124 Mr. Beebe: Offer in evidence, Plaintiff's Exhibit 18, original letter dated November 14, 1916, from Anderson & Gustafson to N. & G. Taylor Company, Philadelphia, Pa.

Witness: Have seen the letter. Obtained it through the mail in regular course of business.

Received in evidence, marked Plaintiff's Exhibit 18, as follows:

125 PL. EX. 18 IN EVID

(Letterhead of Anderson & Gustafson, Petroleum and its Products. New York.)

November 14, 1916.

N. & G. Taylor Co.,
Philadelphia,
Penna.

Gentlemen:—

We are in receipt of yours of the 13th instant, and have instructed our Chicago office to ship you five cars of Fuel Oil, also to advise you as to when they will be shipped.

In this connection we want to call your attention to what we have before stated to you over the phone, that there is going to be more or less delay on all shipments due to the shortage of tank cars.

We are doing everything possible to take care of our trade.

Yours very truly,
ANDERSON & GUSTAFSON
By B. H. KLASE.

BHK/B

(Stamps) Answered 11-15-16. N. & G. Taylor Co. Philadelphia. Nov. 15, 1916.

126 Mr. Beebe read Plaintiff's Exhibit 18 to the jury.

Mr. Beebe: Offer documents marked Plaintiff's Exhibits 19 to 25, acknowledgments by Anderson & Gustafson of orders given them.

Witness: They are as follows:

25,	dated	November	6,	received at	Philadelphia	office Nov. 9th
24,	"	"	6,	"	November	9th
23	"	"	15,	"	"	17th
22	"	"	15,	"	"	17th
21	"	"	15,	"	"	17th
20	"	"	15,	"	"	17th
19	"	"	15,	"	"	17th

Mr. Young: Object. Had nothing to do with case.

Mr. Beebe: Terms exactly in compliance with contract. Price of first two supposed to be two trial cars and remainder at price—

The Court: May be admitted in evidence with understanding if after additional proof offered court sees fit to strike out, will preserve that right.

Documents received in evidence, marked Plaintiff's Exhibits 19 to 25, inclusive, are as follows:

127 PL. EX. 19

Acknowledgment of Order
given
Anderson & Gustafson
Petroleum and Its Products
1532 Transportation Bldg.

Telephone Harrison 6303 Chicago, Ill. November 15, 1916.

Our
Order Number
9623
Customers
Order Number

Sold by Anderson & Gustafson,
Chicago, Ill.
Ship to N. & G. Taylor Co.,
Cumberland, Md.
Charge to N. & G. Taylor Co.,
Philadelphia, Pa.
Routing

Quantity	Description	Price
1 T/C 30—32 Fuel Oil @ 5½c per gallon.		
F.O.B. Refinery, freight allowed to destination.		
Immediate shipment.		
Delivery Record Terms: 30—1—10.		
Car Number	Anderson & Gustafson	
Date of Shipment	Per J A	

(Stamp) Received N. & G. Taylor Co. Philadelphia. Nov 17 1916

128 PL. EX. 20

Acknowledgment of Order
given
Anderson & Gustafson
Petroleum and Its Products
1532 Transportation Bldg.

Telephone Harrison 6303 Chicago, Ill. November 15, 1916.

Our
Order Number
9622
Customers
Order Number

Sold by Anderson & Gustafson,
Chicago, Ill.

Ship to N. & G. Taylor Co.,
Cumberland, Md.

Charge to N. & G. Taylor Co.,
Philadelphia, Pa.

Routing

Quantity	Description	Price
1 T/C 30—32 Fuel Oil @ 5¼c per gallon.		
F.O.B. Refinery, freight allowed to destination.		
Immediate shipment.		
Delivery Record Terms: 30—1—10.		
Car Number	Anderson & Gustafson	
Date of Shipment.....	Per J A	

Pl. Ex. 129

PL. EX. 21

Acknowledgment of Order
given
Anderson & Gustafson
Petroleum and Its Products
1532 Transportation Bldg.
Telephone Harrison 6303 Chicago, Ill. November 15, 1916.

Our
Order Number
9621
Customers
Order Number

Sold by Anderson & Gustafson,
Chicago, Ill.
Ship to N. & G. Taylor Co.,
Cumberland, Md.
Charge to N. & G. Taylor Co.,
Philadelphia, Pa.
Routing

Quantity	Description	Price
1 T/C 30—32 Fuel Oil @ 5½c per gallon.		
F.O.B. Refinery, freight allowed to destination.		
Immediate shipment.		
Delivery Record Terms: 30—1—10.		
Car Number _____	Anderson & Gustafson	
Date of Shipment _____	Per J A	

(Stamp) Received N. & G. Taylor Co. Philadelphia. Nov 17 1916

130 PL. EX. 22 Pl

Acknowledgment of Order
given
Anderson & Gustafson
Petroleum and Its Products
1532 Transportation Bldg.
Telephone Harrison 6303 Chicago, Ill. November 15, 1916.

Our
Order Number
9620
Customers
Order Number

Sold by Anderson & Gustafson,
Chicago, Ill.
Ship to N. & G. Taylor Co.,
Cumberland, Md.
Charge to N. & G. Taylor Co.,
Philadelphia, Pa.
Routing

Quantity	Description	Price
1 T/C 30—32 Fuel Oil @ 5¼c per gallon.		
F.O.B. Refinery, freight allowed to destination.		
Immediate shipment.		
Delivery Record Terms: 30—1—10.		
Car Number	Anderson & Gustafson	
Date of Shipment	Per J A	

(Stamp) Received N. & G. Taylor Co. Philadelphia.

131 PL. EX. 23

Acknowledgment of Order
given
Anderson & Gustafson
Petroleum and Its Products
1532 Transportation Bldg.
Telephone Harrison 6303 Chicago, Ill. November 15, 1916.

Our
Order Number
9619
Customers
Order Number

Sold by Anderson & Gustafson,
Chicago, Ill.
Ship to N. & G. Taylor Co.,
Cumberland, Md.
Charge to N. & G. Taylor Co.,
Philadelphia, Pa.
Routing

Quantity	Description	Price
1 T/C 30—32 Fuel Oil @ 5¼c per gallon.		
F.O.B. Refinery, freight allowed to destination.		
Immediate shipment.		
Delivery Record Terms: 30—1—10.		
Car Number _____	Anderson & Gustafson	
Date of Shipment _____	Per J A	

(Stamp) Received N. & G. Taylor Co. Philadelphia. Nov 17 1916

132 PL. EX. 24

Acknowledgment of Order
given
Anderson & Gustafson
Petroleum and Its Products
1532 Transportation Bldg.
Telephone Harrison 6303 Chicago, Ill. November 6th, 1916.

Our
Order Number
9411
Customers
Order Number

Sold by Anderson & Gustafson,
Chicago, Ill.
Ship to N. & G. Taylor Co.,
Cumberland, Md.
Charge to N. & G. Taylor Co.,
Philadelphia, Pa.
Routing B & O unless otherwise advised.

Quantity	Description	Price
1 T/C	Fuel Oil @ $5.05 per 100 gallons.	

F.O.B. Refinery, freight allowed to destination.
Immediate shipment.
Delivery Record Terms: 30—1—10.
Car Number _____
Date of Shipment _____

Anderson & Gustafson
Per J A

(Stamp) Received N. & G. Taylor Co. Philadelphia. Nov 9 1916

133 PL. EX. 25

Acknowledgment of Order
given
Anderson & Gustafson
Petroleum and Its Products
1532 Transportation Bldg.
Telephone Harrison 6303 Chicago, Ill. November 6th, 1916.

Our
Order Number
9410
Customers
Order Number

Sold by Anderson & Gustafson,
Chicago, Ill.
Ship to N. & G. Taylor Co.,
Cumberland, Md.
Charge to N. & G. Taylor Co.,
Philadelphia, Pa.
Routing B & O unless otherwise advised.

Quantity	Description	Price
1 T/C	Fuel Oil @ $5.05 per 100 gallons. F.O.B. Refinery, freight allowed to destination. Immediate shipment. Delivery Record Terms: 30—1—10. Car Number _____ Date of Shipment _____	Anderson & Gustafson Per J A

(Stamp) Received N. & G. Taylor Co. Philadelphia. Nov 9 1916

134 Witness: These are acknowledgments and specifications against orders we had with Anderson & Gustafson, namely, trial orders for two cars. Received no other acknowledgments of orders at any time from Anderson & Gustafson. Did not receive cars under all seven acknowledgments. Received only five of them. Received one car at 5.05 price. Four at contract price of 5.25. Gave one order outside of contract entered into with Anderson & Gustafson.

Mr. Beebe: Offer in evidence as Plaintiff's Exhibits 26, 27 and 28, carbon copies of three telegrams dated respectively November 15, November 17 and November 17, from N. & G.

Taylor Company, Philadelphia, to Anderson & Gustafson, Woolworth Bldg., New York.

Mr. Young: Object. Telegrams refer to five cars oil ordered in November prior to time plaintiff signed contract and are not in case.

The Court: Admitted, subject to objection, with same reservation as others.

Received in evidence, marked Plaintiff's Exhibits 26, 27 and 28, as follows:

135 PL. EX. 26 IN EVID.

Folder No.

Confirmation of Telegram
from
N. & G. Taylor Co.

Postal 5.15 P. M.

9588
Philadelphia, Nov. 15, 1916.

Anderson & Gustafson,
Woolworth Building,
New York.

Rush five cars fuel oil badly needed to prevent shutdown.

N. & G. TAYLOR COMPANY
(B)

Full Pay

136 PL. EX 27 IN EVID.

Folder No.

W. Union. .... P. M.
Confirmation of Telegram
from
N. & G. Taylor Co.

9588
Philadelphia, November 17, 1916

Anderson & Gustafson
Transportation Bldg.
Chicago Illinois

Telegram received no shipments have been made yet on November quota our contract we appeal to you to help us over this temporary emergency by giving preference to our order for five cars

N. & G. TAYLOR Co.,
(A)

Full Pay

137 PL. EX. 28 IN EVID.

Postal 10.16 A. M.

Folder No.

Confirmation of Telegram
from
N. & G. Taylor Co.

9588

Philadelphia November 17, 1916

Anderson & Gustafson
Transportation Bldg.
Chicago Illinois

Are now shut down for lack of oil please do everything possible to rush delivery in full of our November quota advise us by wire what we may expect

N & G Taylor Co.

Full Pay (A)

138 Witness: Exhibit 26 was office file copy of telegram by Postal telegram to Anderson & Gustafson, New York, November 15. Exhibit 27 was to Anderson & Gustafson, Transportation Bldg., Chicago, by Western Union, November 17, 1916. Exhibit 28 to Anderson & Gustafson, Transportation Building, Chicago, November 17, Postal telegram. That is, one November 15, two November 17,

Mr. Beebe: Offer as Plaintiff's Exhibit 29, original Western Union telegram, November 17, 1916, from Anderson & Gustafson, Chicago, Ill., to N. & G. Taylor Company, Philadelphia.

Witness: Telegram was received from Anderson & Gustafson dated November 17, 11:31 A. M. Chicago. Received in regular course of business November 17.

Mr. Beebe: Offer as Plaintiff's Exhibit 30, letter November 17, 1916, from Anderson & Gustafson, Chicago, to N. & G. Taylor Company, Philadelphia.

Witness: Received it by mail in regular course of business.

Mr. Young: Same objection to these two documents.

Documents were received in evidence, marked Plaintiff's Exhibits 29 and 30, and are as follows:

139 PL. EX. 29 IN EVID.

(Western Union Letterhead.)

Received at Third & Chestnut, Both Phones
C 22P FD 14

Chicago Ills 1131 AM Nov 17 1916

N and G Taylor Co
Phila Pa

Can Promise Nothing Encouraging Account Tank Car Scarcity No Fuel En Route You Now Writing

ANDERSON AND GUSTAFSON

113P

(Stamp) Wired 11-17-16 Received N. & G. Taylor Co. Philadelphia, Nov 17 1916

(In lower right-hand corner) Telegram received no shipments have been made yet on November quota contract We appeal to you to help us over this temporary emergency by giving precedence to our oder for five cars

140 PL. EX. 30 IN EVID.

(Letterhead of Anderson & Gustafson, Chicago.)

November 17, 1916.

N. & G. Taylor Co.,
Philadelphia,
Pa.

Gentlemen:

We regretted very much the necessity of replying to your wire today, in the way which we were compelled ot reply to it, but the facts are as indicated in our message, not at all encouraging.

On account of the tank car situation, we are very much behind in our fuel shipments and up to date have not been able to divert any cars to you to apply on your november orders. We hope to be able to divert a part of the cars already ordered early next week, but it does not appear at all likely that we can divert any before that time.

We regret very much the circumstances which exist, but just now do not seem to be able to overcome the obstacles in the way of securing prompt shipment.

As soon as we have diverted any cars to you, we will advise you immediately.

Very truly yours,

ANDERSON & GUSTAFSON.

FES:D. F. E. SPENCER

(Stamp) Received N. & G. Talor Co. Philadelphia, Nov. 20 1916.

141 Mr. Beebe read Plaintiff's Exhibits 29 and 30 to jury.

Mr. Beebe: Offer in evidence Plaintiff's Exhibit 31, original letter December 2, 1916, from Anderson and Gustafson, Chicago, to N. & G. Taylor Company, Philadelphia.

Witness: Received by Philadelphia office December 4, in regular course of business.

Document was received in evidence, marked Plaintiff's Exhibit 31; is as follows:

142 PL. EX. 31 IN EVID.

(Letterhead of Anderson & Gustafson, Chicago.)

9588

Dec. 2, 1916.

N. & G. Taylor Co.,
Philadelphia, Pa.
Gentlemen:

Replying to your letter of the 29th inst. which had reference to ours of the 27th wish to refer you to our letter of the 29th which goes further into detail with regard to our supplying you with fuel oil, and we wish further to advise you that we have already used special effort in order to accommodate you because we appreciate as well as you do, that your first impression of us will doubtless go a good ways toward forming your permanent opinion of the way in which we do business.

You can rest assured that our disappointment undoubtedly is greater than yours to be in a position where we cannot supply you with fuel oil you desire to have. If it were not for our very great desire to take care of you, at least reasonably well, we would not have diverted to your already three cars, as we have the most urgent need for them right in this territory from which the tank cars can be returned to refinery much more quickly than they can from your plant.

The condition begins to look a little better just now, and

we are hoping that we can give you some additional car numbers within the next few days. If such is the case, you will have them as soon as we determine just exactly what cars can be diverted to you.

Very truly yours,

ANDERSON & GUSTAFSON

RES:Q F E SPENCER

(Stamp) Received N. & G. Taylor Philadelphia. Dec. 4 1916.

143 Mr. Beebe read Plaintiff's Exhibit 31 to Jury.

Mr. Beebe: Offer in evidence as Plaintiff's Exhibit 32, letter November 25, 1916, from Anderson & Gustafson, Chicago, to N. & G. Taylor, Company, Cumberland, Maryland.

Witness: Received in Cumberland office. Before the letter last previously read.

Document received in evidence, marked Plaintiff's Exhibit 32. Is as follows:

144 PL. EX. 32 IN EVID.

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago.)

9588

November 25, 1916.
Order 9411

N. G. Taylor Co.,
Cumberland, Md.

Gentlemen:

We have ordered to your company today GATX car 9646 containing fuel oil.

Car left refinery on the 22nd inst.

When empty kindly return to the Sapulpa Refining Co., Sapulpa, Okla, via. B&O—B&OSW—Frisco.

Will advise you later regarding movement of car.

Very truly yours,

ANDERSON & GUSTAFSON

S/W By P G SCHWARTZ

CC to New York Office.

(In lower left-hand margin) Cor. received 12-4-16 Unloaded 12-22-16.

145 Mr. Beebe read plaintiff's Exhibit 32 to jury.

Witness: Car received December 4th. Unloaded December 22nd. Was first of trial cars.

The Court: That was one of two cars mentioned in the inducement to the contract? Only one.

Witness: G. A. T. X. means Genral American Tank Car. Rented by General American Tank Car Corp. of America. They are in business of manufacturing and renting tank cars. They own no railroads. Do not run a refinery to my knowledge.

Mr. Beebe: Offer in evidence as Plaintiff's Exhibit 33, carbon copy of letter dated January 13, 1917, from N. & G. Taylor Company to Anderson & Gustafson, Transportation Bldg., Chicago.

Witness: It was mailed.

Document received in evidence, marked Plaintiff's Exhibit 33. Is as follows:

146 PL. EX. 33 IN EVID.

9588

January 13, 1917.
Dic. 1-12-17.

Anderson & Gustafson,
Transportation Bldg.,
Chicago, Ill.

Dear Sirs:

We have just received your telegram reading—

"Fuel shipments into far east impossible for present."

We are very much disturbed over this, as we have within the past day or two received an offer of prompt shipment of several cars from the Oklahoma district, and have also been advised by our freight acquaintances that the shipping situation is very much better in that district. If others can offer us shipments for prompt delivery from the Oklahoma region, surely you cannot claim that your failure to keep us supplied is due to absolute embargo on the part of the railroads, as your telegram indicates.

As your correspondence holds out no prospect of our getting any satisfaction by mail, the writer is arranging to go to Chicago and will see you at your office in the near future.

Very truly yours,

147 Mr. Beebe: Offer in evidence as Plaintiff's Exhibit 34, letter dated January 16, 1917, from Anderson & Gustafson, Chicago, to N. & G. Taylor Company, Philadelphia.

Witness: Received it January 18, at the Philadelphia office, in regular course of business.

Received in evidence, marked Plaintiff's Exhibit 34, as follows:

148 PL. EX. 34 EVID.

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago.)

January 16, 1917.

9588

N. & G. Taylor Company,
Philadelphia,
Pa.

Gentlemen:

We are in receipt of your letter of the 13th, which had reference to our wire advising that we were unable to ship fuel oil for the present into your territory and we presume by this time, you have received our letter of the 12th, on this same subject.

We have noted the fact that the writer of your letter of the 13th, intends to come to Chicago for the particular purpose of securing more information regarding the prospect of securing fuel oil from us.

We shall be very glad to see your representative, although we are not sure that any more information can be given at the time he calls, than has been given in our correspondence. However, if it is possible for us to make the situation more clear, through a personal visit of your representative we shall be more than glad to do so.

We regret the fact that you feel it necessary to make a trip in order to satisfy yourselves as to actual conditions, but if that is your feeling we have no disposition to prevent your so doing if that is your best judgment.

Very truly yours,

ANDERSON & GUSTAFSON,
F E SPENCER

FES:D.

(Stamps) Received N. & G. Taylor Co. Philadelphia, Jan 18 1917 Answered 1-18-17.

149 Mr. Beebe read Plaintiff's Exhibit 34 to jury.

Witness: I know the meaning of the expression in the contract, 30-32 Baume—It refers to gravity of the oil. Test commonly used in oil industry to determine specific gravity of the fluid.

Mr. Beebe: Did you receive any replies to original letter sent out from others than Anderson & Gustafson?

Mr. Young: Object.

The Court: Sustained.

To which the plaintiffs then and there excepted.

Witness: I know in a general way the character of the Baume test.

Mr. Young: Object. Immaterial whether he knows for N. & G. Taylor bought 30-32.

The Court: Objection sustained.

To which the plaintiffs then and there excepted.

Witness: After receiving telegram November 17, we took steps promptly to secure oil from other sources. That telegram notified us there was no oil enroute; and we were in a serious situation that had to be remedied instantly.

Mr. Young: Object. Mr. Taylor notified Anderson & Gustafson they needn't ship any oil and it was prior to the contract.

Mr. Beebe: It was subsequent to contract.

The Court: He may answer.

Witness: We made purchases. Received first car from Anderson & Gustafson December 4th.

The Court: Don't you admit that the only oil received was 40,000 gallons under contract?

Mr. Beebe: But I want to show a little more in connection therewith.

150 Mr. Beebe: Offer in evidence paper marked Plaintiff's Exhibit 35.

Witness: It is invoice from Anderson & Gustafson, dated November 22, for tank car fuel oil shipped that date. Invoice received at Philadelphia December 1. Car. G. A. T. X. 9646 shipped from Sapulpa, Oklahoma, rate per gallon 5.05. It was first of two test cars ordered. When invoice was received at Philadelphia office, was sent same date to Cumberland works, who put a check stamp on the back to check up price, terms, extensions, and return same date to Philadelphia office after making exact copy of details in bill on what is called their duplicate. Paper shown him by Mr. Beebe, Ex-

hibit 35-b, was marked duplicate. Such duplicate is held at Cumberland plant until shipment arrives. Object in returning invoice to Philadelphia promptly was to take advantage of 1% discount for payment within ten days. As soon as original invoice returned to Philadelphia, passed to Accounting Department, who makes voucher. Voucher marked 35-a was the original entry for records in our office. Plaintiff's Exhibit 35-C is original canceled check sent to Anderson & Gustafson in payment of this particular invoice with 1% discount deducted.

Mr. Beebe: Offer the whole matter in evidence. Plaintiff's Exhibit 35, 35-a, 35-b, and 35-c show whole transaction and method thereof.

Witness: Duplicate is held at Cumberland until car arrives. Date of arrival of car is noted thereon. If any difference in freight or quantity or other variation from original invoice, that is noted on duplicate, when returned and adjustment with shipper made. In other words, we pay before goods arrive.

Documents received in evidence, marked Plaintiff's Exhibits 35, 35-a, 35-b, 35-c, are as follows:

151 PL. EX 35-A.

Accounts Payable

Voucher No. 22694

N. & G. Taylor Co.

Date Dec 6 1916

Paid Check No. .....

To Anderson & Gustafson
Chicago, Ill.

General Accounts

Charge		Amount
GA	Office Furniture and Fixtures	
"B	Pig Tin Purchases	
"C	Merchandise Purchases	
"D	Returns	
"E	Allowances	
	Interest	
"F	Advertising	
"G	Selling Expenses	
"H	New York Office Expenses	

"J	Chicago Office Expenses	
"K	Warehouse Expenses	
"L	Penna, Whse. & S. D. Co. Exp.	
"M	Phila. Office Expenses	
	Total	

Cumberland Works

Charge		Amount
PA	Cumb. Real Estate Improv.	
"C	Cumb. Equip. Improv.	
"E	Cumb. Real Estate Repairs	
"G	Cumb. Equip. Repairs & Replace	
RA	Open Hearth	219.52
"B	Bar Mill	
"C	Hot Rolled	
"D	Pickling	
"E	Annealing	
"F	Cold Rolled	
"G	Resquaring	
"H	Shipping	
"J	Foundry	
"K	Machine Shop	
"L	Copperas	
"M	Electrical	
"N	Boiler House	
"O	Overhead Expenses	
"P	Locomotive Crane	
"W	Storehouse	
	Total	

Tin Plate Works

Charge		Amount
PB	Phila. Real Estate	
"D	Phila. Equipment & Tools	
"F	Phila. Real Estate Repairs	
"H	Phila. Equip. Rep. & Replace	

Cumberland

TB	Pickling	
"A	Tin House	
"C	Assorting	
"D	Shipping	
"E	Box Dept.	

Philadelphia

"A Tin House
"D Shipping
"F Roll Tin
"G Smelting
"H Power
"J Incidentals
"K Stable
Freight and Express

Total	219.52
Less 1%	2.20
Net	217.32

Classification No.	Amount	Classification No.	Amount
		RA 25	219.52

152 PL. EX. 35.

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago.)

Order No. 9411
Your Order No.
Car. No. GATX 9646
Shipped from Sapulpa
Shipped to Cumberland
F. O. B. Refinery
Routing F-B&OSW-B&O
November 22, 1916.

Sold to N. & G. Taylor Company,
At Philadelphia, Pa.
Terms 30—1—10.

Quantity	Description	Gravity	Gallons	Price	Amount
1 T/C	Fuel Oil	30.32	30172	$85.05 V	$513.69 V
	Less Frt.				
	75273# @ 15c $112.91				
	67135# " 27c 181.26				294.17
	Discount Allowed on This Amount				$219.52

If freight charges paid exceed those allowed, deduct actual freight paid and return Original freight paid expense bill and original B/L Immediately with remittance.

(Stamps) Paid Dec 6 1916 Check No. N. & G. Taylor Co. Bill of Lading to Follow Copy Taken Rec'd at Cumb'd Dec. 2—1916 Sent to Phila. Rec. 2—1916

(Endorsed on back)
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us
Frt. to be Charged to Shipper
Extensions Verified Taylor R.C.S. 12/5/16
Approved
Sent to Phila. Office 12-2-16 DWB
Account R. A.
Charge
Number 25
LB. 12/5/16

(Stamp) Received N. & G. Taylor Co. Philadelphia, Dec. 1, 1916.

153 PL. EX. 35-B.

Anderson & Gustafson, Chicago, Ill.
12-22 16

Sold to N. & G. Taylor Co.
Cumberland, Md.

	Gravity			
1 T/C Fuel Oil	30-32	10172G	5.05	513.69
Less frt,	75273≠@15c	112.91		
	67135≠@27c	181.26		294.17
				219.52

Terms: 1% 10
Order No. 9411
Car GATX 9646

Duplicate

(Stamp) Original sent to Phila Dec. 2-1916.

(Endorsed on back) Dec. 2-1916 Left refinery 11/22 12 dys. enroute Released Dec. 22 delayed by shut down Original passed 12/5/16—LB RCS 12/30/16
Date of delivery 12-4-16
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us.

Frt. to be Charged to Shipper
Extensions Verified Taylor
Approved.....
Sent to Phila. Office 12-26-16
Account R A
Charge
Number 25
N. & G. Taylor Weights
Gross 113900
Tare 39740
Net 74160
Stencilled Wt. None
(Stamp) O. K. L. L. H.

154 PL. EX. 35-C.

Established 1810

No. D6510 $217.32

N. & G. Taylor Co.
Manufacturers of Tin Plate
Philadelphia December 6, 1916

Pay to the Order of—Anderson & Gustafson—Two hundred seventeen and 32/100 Dollars Not Over Two Hundred Fifty Dollars.

N. & G. Taylor Co.

To
The Corn Exchange National Bank,
Philadelphia.

(Endorsed) The endorsement of this check is sufficient acknowledgment of payment in full for the following account.
Invoice 11/22/219.52
Discount 2.20
Check 217.32
(Perforated) 2:10 12:11:16

(Stamps) Pay to the Order of Continental & Commercial Nat'l. Bank 7478 Chicago, Ill. 7478 Dec. 9 1916 All Prior Endorsements Guaranteed Union Bank of Chicago Illegible

Pay to the Order of Union Bank of Chicago Anderson & Gustafson

155 Witness: These are assembled in Philadelphia office as soon as duplicate is received from Cumberland so that as they stand, they are in the same form as kept in regular course of business.

Witness (upon being shown Exhibits 36, 37 and 38): Each is invoice for one car. These were three of the four cars.

Mr. Beebe: Offer documents marked 36, 36-a, 36-b; 37, 37-a, 38 and 38-a and 36-c.

Witness: 36 is original invoice from Anderson & Gustafson for one tank car fuel oil shipped November 27 from Niotase, Oklahoma, Car SF 95226. Received December 11th. Exhibit 37 is invoice of Anderson & Gustafson, November 27, for car fuel oil shipped that date, GCSF-8147, from Niotase, Oklahoma (or Kansas). Shipped to Cumberland plant received December 11. Exhibit 38 is another invoice from Anderson & Gustafson for car fuel oil shipped November 28, car SF 96871, from Eldorado, Kansas, to Cumberland plant. Received 21st. All invoices being at price 5.25. Exhibit 36-a covered all these invoices and check was in payment of all three.

Documents were received in evidence, marked plaintiff's Exhibits 36, 36-a, 36-b, 36-c; 37, 37-a, and 38 and 38-a, And are as follows:

155½ PL. EX 36-C.

Established 1810.

No. D6517 686.02

N. & G. Taylor Co.
Manufacturers of Tin Plate

Philadelphia December 8, 1916

Pay to the Order of—Anderson & Gustafson—Six hundred eighty-six and 02/100 Dollars Not Over Seven Hundred Dollars.

N. & G. Taylor Co.

To
Corn Exchange National Bank,
Philadelphia.

(Endorsed) The Endorsement of This Check Is Sufficient

Acknowledgment of Payment in Full for the Following Account.

Invoice	11/27/16	222.34
	27	222.19
	28	248.42
		692.95
Discount		6.93
		686.02

(Perforated) 3:18 12:14:16

(Stamps) Pay to the Order of Any Bank or Trust Co. Prior Endorsements Guaranteed Dec 12 116 Continental and Commercial Nat'l Bank Nathaniel R. Losch, Cashier.

Pay to the order of Union Bank of Chicago Anderson and Gustafson

Pay to the Order of Continental and Commercial Nat'l Bank 7478 Chicago, Ill. 7478 All Prior Endorsements Guaranteed Union Bank of Chicago G Halstrom Cashier

156 PL. EX. 36-A.

Account Payable

Voucher No. 22721

N. & G. Taylor Co.

To Anderson & Gustafson,
Chicago, Ill.

Date Dec 8-1916

Paid Check No. _____

General Accounts

Charge		Amount
GA	Office Furniture and Fixtures	
"B	Pig Tin Purchases	
"C	Merchandise Purchases	
"D	Returns	
"E	Allowances	
	Interest	
"F	Advertising	
"G	Selling Expenses	
"H	New York Office Expenses	
"J	Chicago Office Expenses	
"K	Warehouses Expenses	

"L	Penna, Whse. & S. D. Co. Exp.	
"M	Phila. Office Expenses	
	Total	

Cumberland Works

Charge		Amount
PA	Cumb. Real Estate Improv.	
"C	Cumb. Equip. Improv.	
"E	Cumb. Real Estate Repairs	
"G	Cumb. Equip. Repairs & Replace	
RA	Open Hearth	692.95
"B	Bar Mill	
"C	Hot Rolled	
"D	Pickling	
"E	Annealing	
"F	Cold Rolled	
"G	Resquaring	
"H	Shipping	
"J	Foundry	
"K	Machine Shop	
"L	Copperas	
"M	Electrical	
"N	Boiler House	
"O	Overhead Expenses	
"P	Locomotive Crane	
"W	Storehouse	
	Total	

Tin Plate Works

Charge		Amount
PB	Phila. Real Estate	
"D	Phila. Equipment & Tools	
"F	Phila. Real Estate Repairs	
"H	Phila. Equip. Rep. & Replace	

Cumberland

TB	Pickling	
"A	Tin House	
"C	Assorting	
"D	Shipping	
"E	Box Dept.	

Philadelphia

"A	Tin House	
"D	Shipping	
"F	Roll Tin	

"G Smelting
"H Power
"J Incidentals
"K Stable
Freight and Express

Total	692.95
Less 1%	6.93
Net	686.02

No.	Classification	Amount	No.	Classification	Amount
			RA 25		692.95

157 PL. EX 36.

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago.)

Order No. 9629
Your Order No. _____
Car No. SF95226
Shipped from Niotaze
Shipped to Cumbreland
F. O. B. Refinery
Routing SF-B&O
November 27, 1916

Sold to N. & G. Taylor Company,
At Philadelphia, Pa.
Terms 30—1—10.

Quantity	Description	Gravity	Gallons	Price	Amount
1 T/C	Fuel Oil	30.32	9429	5¼c	$495.02
	Less Frt.				
	69775# @ 15c $104.66				
	42231# " 27c 168.02				272.68
	Discount Allowed on This Amount				$222.34

If freight charges paid exceed those allowed, deduct actual freight paid and return Original freight paid expense bill and original B-L Immediately with remittance.

(Stamps) Bill of Lading to Follow. Copy Taken Rec'd at

Cumb'd Dec. 6-1916 Sent to Phila. Dec 6-1916 Paid Dec 26 1916 Check No. N. & G. Taylor Co.
(Endorsed) Dec. 6-1916
When Received
Terms 1% 10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us.
Frt. to be Charged to Shipper
Extensions Verified Taylor R C S 12/8/16
Approved
Sent to Phila. Office 12-6-16 DWB
Account R. A.
Charge
Number 25

LB 12/8/16

157½ PL. EX. 36-B.

Anderson & Gustafson, Chicago, Ill.

11-27-16

Sold to N. & G. Taylor Co.
Cumberland, Md.

1	T/C Fuel Oil 30-32 9429		5½c	495.02
	Less frt. 69775 #@15c	104.66		
	62231 #@27c	168.02		272.68
				222.34

Car SF 95226
Contract #485
Duplicate
(Stamp) Original sent to Phila. Dec. 6-1916
(Endorsed) Dec. 6-1916
When Received 12-11-16
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us
Frt. to be Charged to Shipper
Extensions Verified Taylor
Approved
Sent to Phila. Office 1-3-17
Account R. A.
Charge
Number 25

N. & G. Taylor Co's Weights

Gross	112000
Tare	43300
Net	68700
Stencilled Wt.	43100

Released Jan. 2 Original passed 12/8/16—L.B.

(Stamp) O. K. L. L. H.

158 PL. EX 37.

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago.)

Order No. 9620
Your Order No.
Car. No. GCSF 8147
Shipped from Niotaze
Shipped to Cumberland
F. O. B. Refinery
Routing SF-B&O
November 27, 1916

Sold to N. & G. Taylor Company,
At Philadelphia, Pa.
Terms 30—1—10.

Quantity	Description		Gravity	Gallons	Price	Amount
1 T/C	Fuel Oil		30-32	9423	5¼c V	$494.71 V
	Less Frt.					
	69730# @ 15c	$104.60				
	62192# @ 27c	167.92				
						272.52
	Discount Allowed on This Amount ☞					$222.19

Contract 485

If freight charges paid exceed those allowed, deduct actual freight paid and return Original freight paid expense bill and original B-L Immediately with remittance.

(Stamps) Copy Taken Rec'd at Cumb'd Dec 6-1916 Sent to Phila. Dec. 6-1916 Paid Dec. 12 1916 Check No.
N. & G. Taylor Co.

(Endorsed) Dec 6-1916
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us.
Frt. to be Charged to Shipper

Extensions Verified Taylor R. C. S. 12/8/16
Approved
Sent to Phila, Office DWB
Account R A
Charge
Number 25
LB 12/8/16

(Stamp) Received N. & G. Taylor Co. Philadelphia, Dec. 4, 1916.

159 PL. EX. 37-A.

Anderson & Gustafson, Chicago, Ill.

11-27-16

Sold to N. & G. Taylor Co.
Cumberland, Md.

1	T/C Fuel Oil 30-32 9423 Gals.		5¼@	494.71
	Less Frt. 69730#@15c	104.60		
	62192#@15c	167.92		272.52
				222.19

Car GOSF 8147
Contract #485

Dunplicate
(Stamp) Original sent to Phila. Dec. 6-1916
(Endorsed) Dec. 6-1916
When Received 12-11-16
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us
Frt. to be Charged to Shipper
Extensions Verified Taylor R. C. S. 1/3/17
Approved
Sent. to Phila. Office 12-30-16
Account R A
Charge
Number 25
Released Dec. 28 Original passed 12/8/16. L. B.
(Stamp) O. K. L. L. H.

160 PL. EX. 38.

(Letterhead of Anderson & Gustafson, Peroleum and Its Products, Chicago.)

Order No. 9623
Your Order No.
Car No. SF 96871
Shipped from Eldorado, Kas
Shipped to Cumberland, Md.
F. O. B. Refinery.
Routing Santa Fe B&O.

Sold to N. & G. Taylor Co.,
At Philadelphia, Pa.
Terms 30—1—10.

Quantity	Description		Gravity	Gallons	Price	Amount
1 T/C	Fuel Oil		30-32	10535	$5.25 √	$553.09 √
	77959 # @ 15c	$116.94				
	69531 # @ 27c	187.73				304.67
						$248.42

Contract 485.

If freight charges paid exceed those allowed, deduct actual freight paid and return Original freight paid expense bill and original B-L Immediately with remittance.

(Stamps) Copy Taken Rec'd at Cumb'd Dec 6-1916 Sent to Phila. Dec 6-1916 Paid Dec 26 1916 Check No.
N. & G. Taylor Co.

(Endorsed)
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us
Frt. to be Charged to Shipper
Extensions Verified Taylor R. C. S. 12/8/16
Approved
Sent to Phila. Office 12-6-16 DWB
Account R. A.
Charge
Number 25.

LB 12/8/16

(Stamp) Received N. & G. Taylor Co. Philadelphia Dec 4 1916.

161 PL. EX. 38-A.

Anderson & Gustafson, Chicago, Ill.

11-28-16

1	T/C Fuel Oil 30-32	10563 Gals	5.25	553.09
	77959#@15c	116.94		
	69531#@15c	187.73		304.67
				248.42

Car SF 96871
Contract #485

Duplicate

(Stamp) Original sent to Phila. Dec. 6-1916

(Endorsed)

When Received 12-21-16
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us
Frt. to be Charged to Shipper
Extensions Verified Taylor
Approved
Sent to Phila. Office 1-17-17
Account R. A.
Charge
Number 25
Released Jan. 15 Original passed 12/8/16—LB.

(Stamp) O. K. L. L. H.

162 Mr. Beebe: Offer Plaintiff's Exhibit 39, 39-a, 39-b and 39-c.

Witness: Exhibit 39 is invoice from Anderson & Gustafson dated November 30, 1916, for one large car fuel oil F-190100, shipped from Niotase to Cumberland works. Price 5.25. Received Cumberland January 22, 1917. Exhibit 39-c is check in payment of invoice less 1% discount.

Documents were received in evidence, marked plaintiff's Exhibits 39, 39-a, 39-b, and 39-c, and are as follows:

163 PL. EX. 39-C.

No. D6545 $233.81

Established 1810.
N. & G. Taylor Co.
Manufacturers of Tin Plate
Philadelphia December 11, 1916

Pay to the Order of—Anderson & Gustafson—Two hundred thirty-three and 81/100 dollars Not Over Two Hundred Fifty $250.

N. & G. Taylor Co.

To
The Corn Exchange National Bank,
Philadelphia.

(Endorsed) The Endorsement of This Check Is Sufficient Acknowledgment of Payment in Full for the Following Account:

Invoice 11/30	236.17
Discount	2.36
Check	233.81

(Perforated) 3:18 12:15:16

(Stamps) Pay to the Order of Continental & Commercial Nat'l Bank 7478 Chicago, Ill. 7478 Dec 14 1916 All Prior Endorsements Guaranteed Union Bank of Chicago, G. Hallsom, Cashier. Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed 12 14 16 Continental and Commercial National Bank of Chicago Nathaniel R. Losch Cashier. Pay to the Order of Union Bank of Chicago Anderson and Gustafson.

164 PL. EX. 39-B.

Voucher No. 22722

Account Payable
N. & G. Taylor Co.

Date Dec 11 1916
Paid Check No.

To Anderson & Gustafson,
Chicago, Ill.

General Accounts

	Charge	Amount
GA	Office Furniture and Fixtures	
"B	Pig Tin Purchases	
"C	Merchandise Purchases	
"D	Returns	
"E	Allowances	
	Interest	
"F	Advertising	
"G	Selling Expenses	
"H	New York Office Expenses	
"J	Chicago Office Expenses	
"K	Warehouse Expenses	
"L	Penna. Whse. & S. D. Co. Exp.	
"M	Phila. Office Expenses	
	Total	

Cumberland Works

	Charge	Amount
PA	Cumb. Real Estate Improv.	
"C	Cumb. Equip. Improv.	
"E	Cumb. Real Estate Repairs	
"G	Cumb. Equip. Repairs & Replace	
RA	Open Hearth	236.17
"B	Bar Mill	
"C	Hot Rolled	
"D	Pickling	
"E	Annealing	
"F	Cold Rolled	
"G	Resquaring	
"H	Shipping	
"J	Foundry	
"K	Machine Shop	
"L	Copperas	

"M Electrical
"N Boiler House
"O Overhead Expenses
"P Locomotive Crane
"W Storehouse
Total

Tin Plate Works

Charge		Amount
PB	Phila. Real Estate	
"D	Phila. Equipment & Tools	
"F	Phila. Real Estate Repairs	
"H	Phila. Equip. Rep. & Replace	

Cumberland

TB	Pickling	
"A	Tin House	
"C	Assorting	
"D	Shipping	
"E	Box Dept.	

Philadelphia

"A	Tin House	
"D	Shipping	
"F	Roll Tin	
"G	Smelting	
"H	Power	
"J	Incidentals	
"K	Stable	
	Freight and Express	
	Total	236.17
	Less 1%	2.36
	Net	233.81

Classification No.	Amount	Classification No.	Amount

Classification No.	Amount	Classification No.	Amount
		R A 25	236.17

165 PL. EX. 39 IN EVID.

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago.)

Order No. 9629
Your Order No.
Car. No. F-190100
Shipped from Niotaze
Shipped to Cumberland
F. O. B. Refinery
Routing MP B&OSW
November 30, 1916.

Sold to N. & G. Taylor Co.,
At Philedlphia, Pa.
Terms 30—1—10.

Quantity	Description	Gravity	Gallons	Price	Amount
1 T/C	Fuel Oil	30.32	10016	5¼c	$525.84
	Less Frt.				
	7411 @ 1½c $111.18				
	6610 @ 2½c 178.48				289.67
	Discount Allowed on This Amount 1%				$236.17

If freight charges paid exceed those allowed, deduct actual freight paid and return Original freight paid expense bill and original B/L Immediately with remittance.

(Stamps) Paid Dec 11 1916 Check No. N. & G. Taylor Co. Copy Taken Rec'd at Cumb'd Dec 7 1916 Sent to Phila. Dec 7 1916.

(Endorsed) Dec 7 1916.
Terms 1%—10
Purchase Point of Delivery Our Works
Frt. to be Paid by Us.
Frt. to be Charged to Shipper
Extensions Verified Taylor R. C. S. 12/8/16
Approved
Sent to Phila. Office 17-7-16 DWB
Account R. A.
Charge
Number 25

LB 12/8/16

(Stamp) Received N. & G. Taylor Co. Philadelphia Dec 6 1916.

166 PL. EX. 39-A.

Anderson & Gustafson, Chicago.

11-30-16

Sold to N. & G. Taylor Co.
Cumberland, Md.

1 T/c Fuel Oil 30-32	10016 Gallons		5¼	525.84
Less Frt.	74118 # @ 15c	$111.18		
	66106 # @ 15c	178.49		289.67
				236.17

Car F 190100

Duplicate

(Stamp) Original sent to Phila. Dec 7-1916.

(Endorsed) Dec 7-1916.

Received 1-22-17

Terms 1%—10

Purchase Point of Delivery Our Works

Frt. to be Paid by Us.

Frt. to be Charged to Shipper

Extensions Verified Taylor

Approved

Sent to Phila. Office 1-24-17

Account R. A.

Charge

Number 25

Released Jan. 23 Original passed 12/8/16—I.B

N. & G. Taylor Co.'s Weights

Gross	114920
Tare	42400
Net	72520
Stencilled Wt	none

(Stamp) O. K. L. L. B.

167 Witness: These were four cars applying on contract at contract price. The last one was at 5.25.

Mr. Young: It was one of the four. The first car was one of the test cars at 5.05. These four are four cars at 5.25.

Mr. Beebe: Offer Plaintiff's Exhibits 40, 40-a, 40-b, and 40-c.

Witness: 40-c is credit memorandum from Anderson & Gustafson, Chicago, February 12, on account of freight dif-

ference on three cars they shipped. These are charge memo randa that went through the Accounting Department and served to illustrate the necessity for later adjustment. Therefore any adjustment had to be made later and this was one of the later adjustments.

Said documents, marked Plaintiff's Exhibits 40 ,40-a, 40-b, and 40-c, were thereupon received in evidence and are as follows:

Pa: 168
44

PL. EX. 40.

Account Payable

Voucher No. 23314

N. & G. Taylor Co.

To Anderson & Gustafson,
Chicago, Ill.

Date 3/7/17

Paid Check No.

General Accounts

Charge		Amount
GA	Office Furniture and Fixtures	
"B	Pig Tin Purchases	
"C	Merchandise Purchases	
"D	Returns	
"E	Allowances	
	Interest	
"F	Advertising	
"G	Selling Expenses	
"H	New York Office Expenses	
"J	Chicago Office Expenses	
"K	Warehouses Expenses	
"L	Penna. Whse. & S. D. Co. Exp.	
"M	Phila. Office Expenses	
	Total	

Cumberland Works

Charge		Amount
PA	Cumb. Real Estate Improv.	
"C	Cumb. Equip. Improv.	
"E	Cumb. Real Estate Repairs	
"G	Cumb. Equip. Repairs & Replace	
RA	Open Hearth	
"B	Bar Mill	105.33
"C	Hot Rolled	
"D	Pickling	
"E	Annealing	

"F Cold Rolled
"G Resquaring
"H Shipping
"J Foundry
"K Machine Shop
"L Copperas
"M Electrical
"N Boiler House
"O Overhead Expenses
"P Locomotive Crane
"W. Storehouse
Total

Tin Plate Works

Charge		Amount
PB	Phila. Real Estate	
"D	Phila. Equipment & Tools	
"F	Phila. Real Estate Repairs	
"H	Phila. Equip. Rep. & Replace	

Cumberland

TB	Pickling	
"A	Tin House	
"C	Assorting	
"D	Shipping	
"E	Box Dept.	

Philadelphia

"A	Tin House	
"D	Shipping	
"F	Roll Tin	
"G	Smelting	
"H	Power	
"J	Incidentals	
"K	Stable	
	Freight and Express	
	Total	
	Less %	105..33
	Net	

Classification
No. Amount
Classification
No. Amount
RA 25m 105.33
(Stamp across face) Charge.

169 PL. EX. 40-A.

(Billhead of N. & G. Taylor Co., Manufacturers of Tin Plate, Philadelphia.)

Sold to Anderson & Gustafson
Transportation Building
Chicago, Ill.

Jan. 19, 1917

Quantity Number	Unit	Sheets per Pkg.	Base Boxes	Basis Gauge Thick	Size	Quality and Material	Price	Amount	Total
Additional freight—inv. 11-28-16 Car SF 96871 Credit R A #25									$22.76

(Stamp across face) Charge.

170 PL. EX. 40-B.

(Billhead of N. & G. Taylor Co., Manufacturers of Tin Plate, Philadelphia.)

Sold to Anderson & Gustafson
Transportation Building
Chicago, Ill.

Jan. 17, 1917

Quantity Number	Unit	Sheets per Pkg.	Base Boxes	Basis Gauge Thick	Size	Quality and Material	Price	Amount	Total
Additional freight:—									
Inv. 11-27-16—Car ARSF 95226							41.30		
" " — " GCSF 8147							41.27		$82.57
Credit R A 25									

(Stamp across face) Charge.

171 PL. EX. 40-C.

No.

Credit Memorandum
Anderson & Gustafson
Transportation Building

Telephone Harrison 6303 Chicago February 12, 1917.
Order #9619-9620-9623
Your Order No.
Car. No.

Credit N. & G. Taylor Co.,
At Philadelphia, Pa.

On A/C of freight differences on the following cars:

SFe 95226	RR. charged	$313.98	
	We allowed	272.68	
			$41.30
GCSF 8147	RR. charged	313.72	
	We allowed	272.52	
			41.27
SFe 96871	RR. Charged	327.43	
	We allowed	304.67	
			22.76

See charges memos 1/17 & 1/19/17

(Stamp on back) Received N. & G. Taylor Co. Philadelphia Feb 15 1917

172 HOLLINGSHEAD N. TAYLOR resumed stand for plaintiff and testified further upon Direct Examination by Mr. Beebe, as follows:

Mr. Beebe: Offer Plaintiff's Exhibit 29.

Mr. Young: Object, as being of a period before contract was signed.

The Court: In same category as others. Admitted subject to same objection.

Witness: Upon receipt of telegram of November 17, stating Anderson & Gustafson could not ship oil, we proceeded to get quotations and place orders elsewhere for oil. Got bids from at least a half dozen people. Selected lowest quotation and placed order accordingly.

Mr. Young: If attempt is being made to prove damages,

the difference would be between contract price and fair market price at time and place of oil in question; specific orders or specific bids are not competent to prove market price; someone who was in the business of buying and selling oil at that time and was acquainted with market price at the time and place of delivery—that would be the measure of damages.

The Court: Asking of bids in open market would indicate the fact they went into the open market.

Mr. Young: But the question does not include place of delivery or kind of oil.

The Court: Suppose those elements presumed, that they were same quality and test.

Mr. Beebe: No, the oil that would be used in the open hearth furnace.

The Court: But oil of the same characteristics as that oil was and the same elements, constituent elements as to test as were contemplated in contract.

173 Mr. Young: Mr. Taylor does not pretend to be an expert on oil or value of oil. He was a consumer experimenting with oil for the first time. That his testimony to date was that, when he received the telegram that no oil was coming, he took steps to get oil elsewhere, and the court had permitted him to testify that he got bids and took the lowest and placed orders.

The Court: What was the mechanical operation by which you secured bids?

Witness: We made inquiry by telephone and letter, telephone largely, and Philadelphia being an oil center, it was easy to get bids from large producers in that locality.

The Court: You selected a number of persons who would be in position and were dealing in oil of the character you anticipated using under contract?

Witness: Yes. I can testify as to what I did.

Mr. Young: I think your Honor has gone the full length in permitting him to testify to what he did. The only one who can testify to a fair market price is someone who knew. The witness is testifying to what others told him.

The Court: He hasn't yet.

Mr. Young: They are trying to show they bought a lot of different quality oil in Pennsylvania.

The Court: There are certain things Plaintiff can testify to. As to market and value, I agree there is no question about the medium by which it was purchased.

Mr. Young: Pending question is immaterial.

The Court: Did you in fact purchase oil?

Witness: Yes. On November 17th—May I refer to a memorandum I made up from my records?

Mr. Beebe: I have certain matters here, if you go into that.

Mr. Young: May I have an objection and exception to
174 these questions?

The Court: Surely.

The Court: Let it be admitted just now, subject to your objection.

Witness: We placed an order with the Sun Company for one car and an order with the Union Petroleum Company for four cars, and another with Union Petroleum Company for five cars, and another with Atlantic Petroleum Company for five cars, all on November 17. We have been burning oil since the latter part of 1916. I don't know whether we were offered any 30 to 32 Baume oil at that time because that wasn't an important consideration with us. What we were after was simply low sulphur oil.

175 JOSEPH J. MULVEY, Witness for plaintiff, being first duly sworn, upon Direct Examination by Mr. Beebe, testified as follows:

Name, Joseph J. Mulvey. Business, Petroleum business, Associated with the Atlantic Refining Company, Philadelphia. For twelve years. Assistant to Manager of Fuel Oil Department. In that position has to do with sale of fuel oil. Have had to do therewith for nine or ten years. November, 1916, to June 1917 knew the course, character and condition of market in Mid-Continental and east but not Pacific Coast. Atlantic Refining Company in business of producing, refining and marketing of all petroleum products. Familiar with kind of oil designated in contract. As to whether any market price bought that class of oil at that time, it would depend on refinery's circumstances, whether it wanted to sell or not. There would be a market price for any particular refining company.

The Court: Would there be a market price for class of oil designated in contract at time stated in contract?

Witness: Market price is anything you can get for it. There was a market price in 1916-1917 for 30-32 Baume Fuel oil. 30-32 Baume oil produced any place there is a refinery.

There are differences in gravity according to grade of good run, but could blend Distillate with Residual Oil and get any gravity desired. Do not know now market value at time of contract, November until June. But there was a market price. Do not know what specific market price was without investigating. Have been engaged generally in petroleum business about twelve years. Know what Baume test is.

176 It is an indication of gravity or weight. Determined by taking vessel, usually termed a beaker, place the petroleum therein and emersing hydrometer. Gravity read by Baume scale on hydrometer by depth to which hydrometer goes into liquid. 30 to 32 is indication of Baume scale, meaning varying from 30 on low side to 32 on high side. Would indicate weight. If went to 34 or 36 would indicate lighter oil. If goes down to 28, would indicate heavier oil. The heavier the oil, the more heat units per gallon. Would be no indication of sulphur content. Sulphur and gravity do not run together as general rule. Can get low gravity and low sulphur oil from low sulphur base. Have much to do with selling to steel plants. Know that N. & G. Taylor Company have open hearth plant. Never saw it. Have sold them oil. Know character of oil used in open hearth furnaces. Gravity not essential. Sulphur usually important determination. During this period of time we were making 30 to 32 Baume gravity oil.

Mr. Beebe: Offer to show by witness it was universally accepted custom that there was no distinction in filling orders between 30 to 32 gravity and gravities 28 to 40.

Mr. Young: I Object.

The Court: Sustained.

To which ruling of the court the plaintiffs then and there excepted.

177 HOLLINGSHEAD N. TAYLOR, Resumed stand for Plaintiff and testified further upon Direct Examination by Mr. Beebe, as follows:

In putting out inquiries November 17th, we specified low sulphur fuel oil, suitable for open hearth furnaces. Made purchases that date. Do not know what gravity oil received, purchased November 17th. Can refresh recollection on what was bought but not what received. Made no tests of gravity, it was immaterial. Didn't put in the gravity, between 30

and 32 Baume in contract, never asked for 30 to 32 Baume. Merely asked for oil suitable for furnaces. Slips shown by Mr. Beebe were office records of orders placed. Made out in triplicate; original to seller; pink copy kept as office record; blue copy to works so they will know what purchased. Know they indicate order placed. Orders placed in accordance with slips shown marked Plaintiff's Exhibits 41-42-43 and 44. Certain markings on slips were part of record when written, including telephoning and the other memoranda. Slip was carbon copy made at same time. Were certain notations made on order as transaction proceeds. Blank spaces for goods received, when clerk in charge of papers marks down date goods arrived, another space for invoice placed, meaning invoices past department have been checked up and gone to accounting department, as subsequent entries are made on document so they may have complete record of transaction. Have personal knowledge of entries, made them myself. Were made in regular course of business. Exhibits 45, 46 and 47 are original invoices received from Atlantic Refining Company, Philadelphia, under several dates, for fuel oil purchased from them. Would have to check back with order to make certain of date thereof. Three cars purchased on order 112201 of November 17th. Are invoices of cars received on particular order. Exhibit 48 is accounting department's 178 voucher for which check is made out covering these three cars, these three invoices. I am President of N. & G. Taylor Company at Philadelphia, Pa. Business was changed from a partnership to a corporation in January, 1917. I was senior partner. When we went into open market at Philadelphia or vicinity to get oil we did not try to purchase same kind and same gravity as mentioned in contract, etc. because never occurred to us. Did not specify 30 to 32 Baume. Do not know whether there was market price on this kind of oil in Philadelphia market, never heard whether there was a market price.

Witness: (Upon being shown Exhibit 49 and being asked its relation to Exhibits 48, 45, 46, 47 and 42): It is check in payment of one of bills covered by voucher. Apparently were other checks covering voucher. Two documents marked Plaintiff's Exhibits 50 and 51 cover entire transaction.

Mr. Beebe: Offer Plaintiff's Exhibit 52, original letter dated January 11, 1917, from Anderson and Gustafson, to N. & G. Taylor Company, Philadelphia, Pa.

Witness: Received letter January 13, 1917 through mail.

Said document was received in evidence marked Plaintiff's Exhibit 52 and is as follows:

179 PL. EX. NO. 52.

(Letterhead of Anderson & Gustafson, Petroleum and its Products, New York.)

January 11, 1917.

N. & G. Taylor Co.,
Philadelphia, Pa.

Gentlemen:

We have yours of the 9th inst., and in compliance with your request, wired you, confirmation of which is attached hereto.

We exceedingly regret our inability to get Fuel Oil to you. It is not entirely the fault of Refiners however, in not allowing equipment to go east, but the fault lies partly with the railroads in refusing to accept shipments into eastern territories, as a good many of the roads have embargoes.

We are informed that Mexico Fuel Oil is being delivered at Baltimore now in large quantities, and that it can be had there to much better advantage than shipping clear across the continent. We hope therefore, that your wants are being supplied for the present, and just as soon as conditions change, and make it possible for us to ship this oil to you, you may rest assured that we will do so.

Very truly yours,

ANDERSON & GUSTAFSON,
JOHN R. ANDERSON.

JAA/H

(Stamp) Received, N. & G. Taylor Co., Philadelphia, 9 a. m., Jan 13 1917.

180 Thereupon, Mr. Beebe read Plaintiff's Exhibit 52 to the jury.

Witness: Documents marked Plaintiff's Exhibits 45, 46, 47 and 48 are called voucher records.

181 Thereupon, the Jury being excused, Mr. Beebe stated that he offered to prove by the original orders, invoices, vouchers and cancelled checks, the oil purchased by the N. & G. Taylor Company during the period of time that the contract with Mr. Gustafson was entered into for, and that the following is a statement of the amount as shown by cash vouchers, cancelled checks, etc.

Mr. Young: This statement will include, will it not, Mr. Beebe, a description of what was purchased, when, from whom, what was paid and when delivered?

The Court: The kind of oil?

Mr. Young: The kind of oil. And the Court sustains my objection to that offer and we will stipulate later to the correstness of the list and that can be inserted.

The Court: Preserve your exception.

Mr. Beebe: The Court sustains the objection to which we except.

182 HOLLINGSHEAD N. TAYLOR Upon Cross-Examination by Mr. Young, testified as follows:

I am President of the N. & G. Taylor Company and have been since the company incorporated in 1917. Was partnership before then. Partners were William W. Justice and myself. Name of firm, N. & G. Taylor Company. Was partnership with general offices in Philadelphia. Company incorporated February 1, 1917. Was partnership when contract executed. Partnership consisted of Mr. Justice and myself. Partnership had been in business since 1810. Not 1910 but 1810. Name had changed slightly in early years. Business founded by my grandfather. Mr. Justice and myself had been partners since 1912. Business incorporated 1917. Added "Incorporated" after the words "N. & G. Taylor Company." Business was the same. Plant was at Cumberland, Maryland. Had no plant elsewhere. Was plant for the manufacture of steel bars and tin plate of all kinds. Were separate units. In 1916 decided to change fuel in steel mill. Prior to that time been burning natural gas. Was not changing over with idea of seeing how fuel oil would work. Change forced on us. Natural gas was failing. Had to get some other kind of fuel. This was our first experience with oil in the steel mill. Burned coal in other part of mill. Didn't change that.

Mr. Young showed witness letter from N. & G. Taylor Company to Anderson & Gustafson, December 14, 1916; (Defendant's Exhibit 2) read part of it to him.

Witness: As stated in this letter of December 14, 1916, the contract in question was sent to N. & G. Taylor Co. by the New York Office of Anderson and Gustafson on November 1, 1916; an accepted copy of the contract was returned by N. & G. Taylor Co. on November 22, 1916. The document, which

you show me, purporting to be a duplicate of the contract, bears my signature. The contract was received in duplicate by our office on November 2d or 3d, and the paper which you have just shown me is the duplicate which I signed on behalf of the N. & G. Taylor Co. and mailed back. I think that
183 was on November 21, 1916. Said signed duplicate contract was thereupon marked Defendant's Exhibit 1.

Witness: I wrote the letter from N. & G. Taylor Co. to Anderson and Gustafson, dated November 22d, which was dictated on November 21st.

Said letter marked Defendant's Exhibit 3.

184 The letter from N. & G. Taylor Co. to Anderson & Gustafson dated December 14, 1916, was marked Defendant's Exhibit 2.

Said exhibits, marked Defendant's Exhibits 1, 2 and 3, received in evidence, and are in words and figures as follows:

185 (Letterhead of Anderson & Gustafson, Petroleum and its Products, New York.)

November 1, 1916.

N. & G. Taylor Company,
Philadelphia, Penna.

Gentlemen:—

In reply to your letter of the 31st ult., and confirming conversation with the writer this date, we have entered your order for

2 Tank Cars Fuel Oil, Gravity 30-32, FOB refinery, freight allowed to Cumberland, Md., @ 5.05 per gallon, terms 1%-10 days, 30 days net.

Subject to our ability to secure tank cars, we submit as follows:

Proposal to furnish the N. & G. Taylor Company, Philadelphia, Pa., with Fuel Oil at their Cumberland, Md. Plant.

Quantity: Their requirements estimated at 1,200,000 gallons to be taken out commencing November 1, 1916, and ending June 30th, 1917, in fairly equal monthly quantities.

Specifications: The gravity of this oil shall be between 30 and 32 Baume.

Price: The price shall be 5¼c per gallon f.o.b. tank cars refinery with freight allowed to Cumberland, Md.

Terms: 1% net amount of invoice for cash in ten days from date of invoice, or 30 days net.

Shipments: Shipments to be made in tank cars of eight to

ten thousand gallons capacity, with the understanding that they furnish us at least 30 days advance notice of date of shipment.

Rates: This delivered price made subject to freight 186 rates now in effect. Any change in rates whether advance or decline to revert to the buyer.

War Tax: This price is not subject to include any tax that the Government may impose on the goods herein described. Should there be any such it will necessarily have to be added to the prices above quoted.

Acceptance: This proposal is submitted in duplicate, the prompt acceptance of which shall constitute a contract between us for the sale and shipment, purchase and acceptance of above goods, same subject to our ability to furnish tank cars; also with the understanding that the two cars for which we have entered your order will be representative of quality of the goods that will be shipped.

Respectfully submitted,

ANDERSON & GUSTAFSON,

By _____

Dated _____ this _____ day of _____ 1916.

Accepted:

N. & G. TAYLOR CO.

By _____

BHK B

187 DEFS. EX. 2. 5-9-24.

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia.)

December 14, 1916.

Dic. 12-13-16.

Anderson & Gustafson,
Transportation Building,
Chicago, Illinois.

Dear Sirs:

Replying to your letter of December 11th, the contracts in question were sent us by your New York office on November 1st, and accepted copy was sent to your New York office on November 22nd. No doubt this information will serve to locate the missing contract for you. If not, we shall be very glad to send you a copy.

Very truly yours,

N. & G. TAYLOR CO.

R. C. S.

C-29.

188 DEFS. EX. 3. 5-9-24.

(Letter head of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia.)

Ex. 7.
November 22, 1916.
Dic. 11-21-16.

Anderson & Gustafson,
Woolworth Building,
New York, N. Y.

Dear Sirs:

Kindly make arrangements at once to start deliveries of Fuel Oil under our contract with you, at the rate of three cars every two days, commencing December 1st, and continuing at this rate until further notice from us. The greater part of the November quota of our contract is overdue, and it is very important that deliveries be brought up to date as promptly as our storage capacity and requirements will permit.

Please give this matter your immediate attention and acknowledge receipt of these instructions by return mail.

We are now depending upon our contract with you to keep our Works going, and we need hardly remind you that any failure to keep us properly supplied would be very disastrous indeed.

We have not yet received the car numbers as promised in your telegram of November 17th, covering the five cars to be shipped on that date or the day following. We sincerely hope that nothing has occurred to delay shipment of these cars
as we are counting upon receiving them in the course of
189 the next week or ten days at Cumberland.

Very truly yours,
N. & G. Taylor Co.

C-29.

(Stamp) Received Nov 23 1916 Answered.

190 Witness: I returned contract signed on November 22, 1916.

Mr. Young read said document, Defendant's Exhibit 3, to Jury.

Witness: Only contract we had was one signed November 21. It is contract sued on in this case. Up to that time we received no oil under contract. Did not write to make ar-

rangements to start deliveries on fuel oil but simply to start new rate of delivery. Was to be three cars every two days. Hadn't received any oil before that. Had specified a rate. Had given them a definite rate of delivery before. Now changed that rate from a few individual shipments to a definite rate of three cars every two days. Hadn't figured out what quota would be, founded on amount specified in contract of 1,200,00 gallons in eight months. Approximate quantity through eight months would be 150,000 gallons per month. 10,000 gallons tank cars would be 15 cars per month. Car every two days on average. Asked for three cars every two days to make up deficiency. Contract was contract in our minds on November 1st. Even though hadn't completed formality of sending signed copy back. November 17 went out and bought some other oil. Didn't mention that in letter of November 22. Received first car from Anderson & Gustafson December 4th. Plaintiff's Exhibit 35 is invoice from Anderson & Gustafson for first car. Dated November 22. Was car billed under 5.05 rate. Was one of two cars referred to as test cars. Was received at Cumberland, Maryland, December 4th. Unloaded December 22d. Suspended operations of steel mill during a period of time in December on account of difficulties with use of steam to blow oil into furnaces. Had to stop operations for a week or nine days, until could change to compressed air. That was time we wired Anderson & Gustafson to suspend shipments. Wired December 9 to ship no more oil until further notice. Plant was down and equipment not working. Think we received other oil in addition to that car. Exhibit 36 is invoice dated November 27th. Goods were received December 11th. That was tank car of oil billed at 5.25 cents. That was price on contract for large quan-
191 tity. Car arrived Cumberland December 11th. Two days after we had wired to suspend shipments. Invoice we had for third car, was November 27th. Was for tank car of oil billed at 5.25 cents, contract price for large quantity. Arrived Cumberland December 11th. Same date as other car. Two cars arrived same time. Fourth invoice, Exhibit 38 bore date November 28th. Car Arrived December 21st. Had three cars then, one arrived December 4th, two December 11th. Before two cars arrived on December 11th we had wired Anderson & Gustafson to suspend shipments. Had storage facilities. Delayed in unloading until December 23d car that arrived December 4th due to temporary congestion. Had more oil coming than we could handle because storage

tanks full and we were not using any oil. Storage tanks had capacity of approximately one months' supply. About 100,000 gallons. Were getting fuel oil from other sources. Storage capacity full when car arrived December 4th. Of two cars that arrived December 11th, one was released January 2nd, the other December 28th. Cars held on track loaded because didn't have place to unload more. Were not using oil during nine days of shut down. Think wrote or wired Anderson & Gustafson to resume shipments on December 22nd. For short period before that time had more oil than could take care of. Do not know customary time allowed to unload tank car and turn back to railroad. Know there is no charge for having car on side track for first 48 hours. Purchaser given that much time to unload. After that is charged so much a day for the car. Invoices do not show date shipped. Date of invoice usually understood as date of shipment.

Witness read dates of shipment and dates of arrival of cars and dates cars released, as follows:

192 Exhibit 35, shipment of November 22, one car, price 5.05, received at Cumberland, December 4, released December 22. Exhibit 36, shipment November 27, one car, price 5.25, received December 11, released January 2. Exhibit 37, shipments November 27, one car, price 5.25, received December 11, released December 28. Exhibit 38, shipment November 28, one car, received at Cumberland, December 21, released January 15. Exhibit 39, November 30, one car, received at Cumberland January 22, released January 23.

193 Witness: First four cars came from Oklahoma, except one car from Eldorado. Noticed first three cars moved from Mid Continent field, Kansas or Oklahoma, to Cumberland, Maryland in 10 or 12 days. Fourth car took longer (Exhibit 39), shipped November 30th, received January 22d. Nearly two months. Car S. F. 96771, Exhibit 38, shipped November 28th, arrived December 21st. One of two test cars, so called, charged at 5.05 cent price. Other four at 5.25 cent regarded as being under larger order. Fourth car shipped took from November 28th to December 21st. Last car took nearly two months. I knew something of railroad conditions at that time. Nothing occurred to me when I noticed it took railroads nearly two months to bring car from Mid-continental fields to Cumberland, Md.

Mr. Young showed witness copy of letter of November 25, 1916, from Anderson & Gustafson to N. & G. Taylor Company.

Witness: Received in regular course of mail. Have seen original.

Said document was received in evidence marked Defendant's Exhibit 4; is as follows:

194 DEFS. EX. 4. 5-9-24.

Nov. 25, 1916.

N. & G. Taylor Co.,
Philadelphia, Pa.
Gentlemen:

Referring further to our letter of Nov. 17th also to yours of Nov. 22nd to our New York office, copy to this office, am very sorry to say that the tank car situation remains practically unchanged, but GATX car #9646 was shipped to you from the Sapulpa Refining Company on November 22nd, and we are doing everything possible to see that this car gets to you with as little delay as possible.

We hope to be able on Tuesday, or Wednesday of next week to give you some definite information regarding at least some of the remaining unfilled orders.

Very truly yours,
ANDERSON & GUSTAFSON

HJ:Q

195 Mr. Young read Defendant's Exhibit 4 to the jury.

Mr. Young showed witness telegram dated November 26, from Anderson & Gustafson to N. & G. Taylor Company.

Witness: Received it.

Said document was received in evidence marked Defendant's Exhibit 5 and is as follows:

196 DEFS. EX. 5. 5-9-24.

(Western Union Letterhead.)

Received at Third & Chestnut, Both Phones.
B 18 1P J 26 Blue

MB Chicago Ills 122 1PM Nov 26 1916

N and G Taylor Co
Phila Pa

197

Refinery failed to ship five cars promised our wire seven-

teenth Could not secure eqnipment Only one car en route to you now Situation beyond our control Writing

ANDERSON AND GUSTAFSON
447PM

(Stamp) Received N. & S. Taylor Co., Philadelphia. Nov. 27, 1916.

197 Mr. Young read Defendant's Exhibit 5 to the jury.

Mr. Young showed copies of two letters written by Anderson & Gustafson to N. & G. Taylor Company, dated respectively, November 27th, 1916 and November 29th, 1916.

Witness: Received them in regular course of business.

Said documents were received in evidence marked Defendant's Exhibits 6 and 7 and are as follows:

198 DEFS. EX. 6. 5-9-24.

November 27, 1916.

N. & G. Taylor,
Philadelphia, Pa.

Gentlemen:

We regret very much that it was necessary for us to reply to your wire received today as per confirmation attached, advising you that the five cars which we attempted to forward to you, as per our wire of the 17th, were never actually shipped by the refinery.

At the time our wire was sent to you stating that those five cars would be diverted on your order, we had just received a wire from our Tulsa office stating that the refinery had agreed to ship out enough cars on that date to make it possible for us to divert the five cars referred to. Instead however, not a single car was shipped for the reason that the tank cars were not available. Consequently we were unable to supply you as we had hoped.

The best we have been able to do so far, was to divert one car to you, namely GATX 9646, concerning which we wrote you on the 25th. It is a very great disappointment to us to be obliged to state that the conditions which have made it impossible for us to forward the cars, is one which does not seem to be getting any better and consequently looks very much as if we would be unable to make delivery in anything like the prompt fashion you desire deliveries to be made.

We assure you that the situation is one which we do not relish and which we are doing everything we can to overcome, but which as indicated in our wire appears to be beyond our general control.

Yours very truly,

ANDERSON & GUSTAFSON.

FES:D.

199 DEFS. EX. 7. 5-9-24.

November 29, 1916.

N. & G. Taylor Co.,
Philadelphia, Pa.

Gentlemen:

We have your letter of the 27th, which has reference to your wire of the same date and in this connection refer you to our letter of the 27th, in which we explained why the five cars referred to in our letter of the 17th, did not reach you.

We can not add much to what we said in our letter of the 27th, except to say that we have arranged to divert two cars to you today, the car numbers of which will be supplied to you by our Traffic Department.

These two cars are being shipped from Niotaze, Kansas. For your information will say that it is not a question of our having oversold our supply but is merely a matter of the refineries from whom we have purchased in sufficient quantities not being able to secure tank cars enough in which to slip out the fuel oil which we have contracted for. As a matter of fact, we are not to blame at all in the matter, although under the circumstances, we are quite naturally the ones who receive the complaints.

We shall at all times endeavor to have the refinery ship the oil which we have bought from them and we hope, just as much as you do, that enough of it may be forwarded to you to take care of your wants. We can not do the impossible however, and can only promise to do the very best we are able.

We do not believe that we should be criticised for having wired you as we did on the 17th, for we did so only in our extreme efforts to please you and if you will look up your records you will find that previous to the wire which promised five cars, we sent you another wire stating that we could not promise anything encouraging. As a matter of fact, between the time we sent the first wire and the second wire, we

had received a telegram from Oklahoma, stating that certain cars were to be shipped that day or the following day which would have enabled us to supply you as we attempted to do.

In our anxiety to please you, we took a chance and advised you definitely that five cars would be shipped that day or the following one. We had no means of knowing that the information which we were in possession of at that time was not accurate and we regret more than you do the fact that it has caused you any inconvenience.

In the future you can rest assured that we will not advise you of cars having been shipped unless we have the actual Bills of Lading before us, or are sure beyond a shadow of doubt that they have been shipped so that there can be no mistake in the matter nor any misunderstanding on your part.

Very truly yours,

ANDERSON & GUSTAFSON.

FES:D.

200 Mr. Young read letter of November 27th, 1916 and November 29th, 1916 to the jury.

Witness: Cannot say without examining record whether those cars were the two cars billed November 28th. One might have been from Niotase, Kansas.

201 Upon being shown letter from N. & G. Taylor Company to Anderson & Gustafson dated December 1, heretofore introduced as Plaintiff's Exhibit 10,—

Witness: Recall letter but do not recall who the four or five sellers were referred to therein. The probability is that they were sellers in Philadelphia because the time being short we were limited to getting prices near by. Recollection is that, on December 1st, four or five large sellers in Philadelphia or New York or Pittsburgh had offered the oil.

Mr. Young: Offer letter of December 4, 1916 from Anderson & Gustafson to N. & G. Taylor Company, marked Exhibit 8.

Witness: Received it.

Whereupon said document marked Defendant's Exhibit 8 was received in evidence. It is as follows:

202 DEFT. EX. 8. 5/9/24.

December 4, 1916.

N. & G. Taylor Co.,
Philadelphia,
Pa.

Gentlemen:

In reply to your letter of December 1st, please be advised that there are now enroute to you five cars of oil the cars numbers being as follows:

GATX 9646 shipped November 22nd.

Santa Fe 95226, shipped November 27th.

GC&SF 8147, shipped November 27th.

Santa Fe 96871 shipped November 28th and Frisco Car 190100 shipped November 30th.

Our Traffic Department will keep you posted as to the movement of these cars and we sincerely trust that they will reach you in time to save you any serious inconvenience.

Also as advised you in previous correspondence, it is our intention to do everything possible to fill your orders promptly and we believe that you will accept the advice contained in this letter as indication of our good faith in the matter.

Yours truly,
ANDERSON & GUSTAFSON.

HJ:D.

203 Witness: These were the five cars referred to in morning testimony. On December 9th upon receipt of that letter, sent telegram to suspend shipments and wrote letter. That is the letter.

Whereupon the telegram and letter of that date marked Defendant's Exhibits 9 and 10 were received in evidence. They are as follows:

204 DEFT. EX. 9. 5/9/24.

(Postal Telegraph Letterhead)

Received at Dearborn St. Phone Wabash 2979 Local 149.
87chr 9 1223pm
po Philadelphia Pa dec 9 1916
Anderson & G

Suspend shipments oil temporary on account shutdown are writing N & G Taylor co

205 DFT. X. 10 5/9/24

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia.)

December 9, 1916.

Anderson & Gustafson,
Transportation Bldg.,
Chicago, Illinois.

Dear Sirs:

We are confronted with a puzzling situation with reference to our oil supply, and are writing you frankly about it, in the hope that you can co-operate with us to straighten it out.

We have run up against an unexpected check in getting our fuel oil equipment going, as we have found after a short run that we cannot operate successfully with steam, and have been obliged to make arrangements to change over as quickly as possible to the use of compressed air to atomize our oil. It will probably be two weeks before we are ready to start up again with oil, and we want shipments suspended for that length of time. Just as soon as we are ready to start up again, we shall want shipments resumed at the rate of three cars every two days, and we shall be in a serious predicament if you cannot maintain shipments to us at that rate.

Will you, therefore, take the opportunity of this interval to arrange matters so that you can be reasonably sure of getting supplies forward to us at this rate when we give you the word.

We want to spare you the possibility of having any tank cars held on demurrage at Cumberland, and therefore ask your co-operation with us.

We have telegraphed you today briefly to this effect, so that you might divert shipments elsewhere for the present.

Awaiting your reply, we are,

Very truly yours,
N. & G. Taylor Co.

C-29.

206 Mr. Young: Offer letter of Anderson & Gustafson in reply, dated December 11th.

Witness: It is the reply I received.

Whereupon said letter marked Defendant's Exhibit 11 was received in evidence. It is as follows:

207 DFT. X. 11 5/9/24

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago)

December 11, 1916.

(Stamp) Answered 12-14-16.
N. & G. Taylor Co.,
Philadelphia, Pa.

Gentlemen:

We have your letter of the 9th inst., and very glad to comply with your instructions with regard to holding up shipments of fuel oil for a matter of two weeks or so. We can not say at this time whether at that time we can be in position to ship you in the quantities desired or not. We are having the utmost trouble just now, making any shipments whatever in the eastern territory. Practically all railroads owning equipment, also refineries owning or leasing their equipment absolutely prohibit allowing their cars to move east of Chicago or the Mississippi river.

This contingency of course, was entirely unforseen, at the time we first arranged to supply you with fuel oil.

In this connection will you be good enough to send us a duplicate copy of your contract with us for fuel oil shipment? We are unable to locate the contract in our office or any record of having received it. It probably was sent to our New York office although we do not find that it has been forwarded to us. We are writing New York on this subject today, also, but in order to be sure of as little delay as possible we are asking you for copy of the contract as we are sure you must have one copy in your files.

It is not our understanding that it called for shipmment at the rate of three cars every two days, although we note that it was requested in your letter of the 9th. We will assure you that it is our desire to take care of you in a most satisfactory manner, but with conditions as they are we doubt if this can be done.

208 We regret very much to note that the cars already shipped you will be held for some time drawing demurrage at Cumberland. This very fact will make it all the harder for us to secure additional shipments as refineries and railroads are watching very carefully the points where cars are delayed and try very hard not to make additional

shipments to these points. Do your utmost not to have these cars delayed longer than necessary.

Very truly yours,
ANDERSON & GUSTAFSON.
F. E. SPENCER.

FES:D.

(Stamp) Received. N. & G. Taylor Co. Philadelphia. Dec 13 1916

209 Witness, upon being shown copy of telegram and of letter dated December 18th from Anderson & Gustafson to N. & G. Taylor: I received them.

Whereupon said documents were received in evidence, marked Defendant's Exhibits 12 and 13. They are as follows:

210 DFTS. X. 12 5/9/24

(Western Union Letterhead)

Confirmation
Dec 18 1916

N & G Taylor Co
Philadelphia Pa

Contract taken subject our ability secure tank cars Unable secure them Cannot guarantee shipments Writing fully
ANDERSON & GUSTAFSON

CHG & PPY

211 DEFT. X. 13 5/9/24

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago)

December 18, 1916.

(Stamp) Answered 12/27/16.
N. & G. Taylor Company,
Philadelphia,
Pennsylvania.

Gentlemen:

Replying to your letter of the 14th inst., will say that we have now located the contract with your company which had been misplaced. With reference to this contract we wish to call your attention to the fact that it was submitted to you

and accepted by you "subject to our ability to secure tank cars."

If you have kept in touch with the situation bearing on the delivery of fuel oil, you doubtless know that the entire trouble at the present time lies in the scarcity of tank car equipment. If we could secure, either through lease or otherwise plenty of tank cars we would have no difficulty in making deliveries of all the fuel oil that our customers desire.

The very great scarcity of tank cars however, has resulted in both the refineries and the railroad companies which either lease or own tank cars practically refusing to allow these cars to move east of the Illinois-Indiana State line. Some roads and some refineries refuse to allow them to move east of Missouri. We have ventured to divert a few cars in the past few weeks into eastern territory and it has resulted in serious consequences making it very difficult for us to buy further fuel oil from the same parties. We think it only fair that we explain this situation to you now as we deduce from your letter of the 9th, that you are counting upon us to supply you with fuel oil at the rate of three cars every two day after you once get started to using fuel oil, and unless the condition changes radically between now and that time, this appears as being entirely impossible.

We note that you will want to plan definitely with re-
212 gard to your fuel oil supply and it is better for us to state the facts frankly at this time rather than to hold out hope which we ourselves can not honestly entertain. While we did not really think that the condition would become as bad as it has still the possibility of having difficulty in securing tank cars was indicated in our original proposal to you which was accepted by you. We want you to know that we are extremely sorry that tanks cars are not very plentiful thereby making it possible for us to serve you satisfactorily.

We wish again to call your attention to the fact that cars which have already been sent to you should not be delayed at Cumberland for one hour more than is absolutely necessary.

We hope that you will reply to us immediately telling us just what cars have been received and when in your estimation these cars may be returned. The delay which confronts on these cars relative to the return thereof, is one that is giving us considerable concern because we will have a hard time explaining and apologizing for this delay. We know

that you could not anticipate this delay but that can not lessen our regret in the matter.

Very truly yours,

ANDERSON & GUSTAFSON.

FES:D. F. E. SPENCER.

(Stamp) Received. N. & G. Taylor Co. Philadelphia. Dec 20 1916

(Pencil notation) 5 cars—No report from Cumb. 5 cars—Union Petroleum—No. report. Unload first.

213 Witness: Plant was shut down from 9th to 18th of December.

Mr. Young: Offer telegram dated 18th.

Witness: Received it.

Mr. Young read it to the jury.

Whereupon said document was received in evidence, marked Defendant's Exhibit 14. It is as follows:

214 DEFT. X. 14

(Postal Telegraph Letterhead.)

(Pencil notation) Contract only calls for 2 every 3 days

Received at Dearborn St. Phone Wabash 2970 Local 140.
53chrj 39 1103A
HO Phila Pa Dec 18 16
A & G Chicago

Resume shipments fuel oil immediately at rate of three cars every two days please do all you can to take care of us and wire us our expense number answer routing of each of first twelve cars as shipped

N & G TAYLOR CO

215 Witness, upon being shown a telegram dated December 18th from Anderson & Gustafson, to N. & G. Taylor Company: Received it.

Whereupon said document was received in evidence, marked Defendant's Exhibit 15. It is as follows:

216 DEFT. X. 15

(Western Union Letterhead)

Dec 18 1916

N & G Taylor Co
Philadelphia Pa

Contract taken subject our ability secure tank cars Unable secure them Cannot guarantee shipments Writing fully

ANDERSON & GUSTAFSON

CHG & PPY

217 Mr. Young: Offer in evidence Plaintiff's Exhibit 16 being a letter dated December 20, 1916, from Anderson & Gustafson to N. & G. Taylor Company, Philadelphia.

Witness. Received it.

Mr. Young read it to the jury.

Said document was received in evidence, marked Defendant's Exhibit 16. It is as follows:

218 DEFTS. EX. 16

Dec. 20, 1916.

N. & G. Taylor Co.,
Philadelphia, Pa.

Gentlemen:

We are in receipt of your wire of the 18th which was in reply to our wire of the same date, and note that it is your opinion that you deserve better treatment than you are receiving from us, for the reason that you are a new contract customer.

In reply, will say that we feel that you are misinterpreting the situation if you have assumed or concluded that we are giving you any treatment other than the very best which we are able to give you. We will say, that you undoubtedly deserve better luck, but you cannot deserve better treatment, for no one can deserve treatment better than that which is possible to be given.

Taking into consideration all circumstances existing, you should understand that we realize very fully that it is highly desirable for us to give the very best possible service to new contract customers, as the first impression received is generally a lasting one. Consequently, our inability to fill your

order promptly and satisfactorily is a source of greatest regret to us. The conditions however, were explained very fully in our letter of the 18th inst. which you doubtless have received by this time, and which we trust you will give your most careful attention.

Very truly yours,
ANDERSON & GUSTAFSON

S:Q

219 Mr. Young: Offer in evidence letter dated December 27, 1916, dictated December 26th, from N. & G. Taylor Company to Anderson & Gustafson.

Witness: I recall the letter.

Mr. Young read it to the jury.

Said document was received in evidence, marked Defendant's Exhibit 17. It is as follows:

220 DF. EX. 17. 5/9/24.

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia.)

December 27, 1916.
Dic. 12 26-16.

Anderson & Gustafson,
Transportation Building,
Chicago, Illinois.

Dear Sirs:

We now have before us your letters of December 18th and 20th, and have been expecting to receive this morning notices of some shipments from you. Surely you can get out an occasional carload for us. A total suspension of shipments seems wholly unreasonable, notwithstanding shortage of cars or other unfavorable traffic conditions. We made our contract with you in good faith, and the total failure of your facilities, so far as we are concerned, does not seem to us to be proper treatment.

For a concern to obligate themselves to furnish the amount of oil that you have done, and then to fall down utterly, pleading car shortage as an excuse, does not sound well to us. If your deliveries had fallen off to as much as 50% there would have been some strength to your position, but to default entirely upon this obligation does not seem to us right. Some

car supply should be available unless you have grossly oversold your capacity.

We considered you a responsible concern, but unless you can get shipments of oil forward to us in some fair quantity, our transaction with you is going to prove a very costly one to us, representing the loss of a good many thousand dollars, all of which could have been avoided if we had been given some hint that your facilities would not stand the strain of winter traffic conditions.

You cannot criticise us for feeling rather bitter about this, as the business was placed with you in competition with several other responsible concerns, each of whom are now offering us liberal quantities for spot shipment at present premium prices.

Very truly yours,

N. & G. Taylor Co.

C 29.

221 Mr. Young: On December 27th, when you wrote this letter, were responsible concerns offering you large quantities for spot shipment at present prices?

Witness: Absolutely. Do not recall the names at the present time. They were probably of local district. Philadelphia. Because they have in Philadelphia concerns representing sellers of oil all over the country; they were not just refineries in Philadelphia. It was not necessarily Pennsylvania fuel oil. May have been Mid-Continent or Texas of Pennsylvania. So far as I know could have bought liberal quantities of Mid-continent, Texas and Pennsylvania fuel oil from some concerns. No trouble to get oil.

The Court: What about the price?

Mr. Young: I didn't ask him about the price; he didn't mention it here.

Mr. Beebe: He said premium prices there.

Mr. Young: He says at present premium prices.

Mr. Young: Offer marked Defendant's Exhibit 18, letter dated December 29th, from Anderson & Gustafson, to N. & G. Taylor Company.

Witness: Received it.

Mr. Young read it to jury.

Whereupon said document was received in evidence, marked Defendant's Exhibit 18. It is as follows:

222 DEFT. X. 18

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago)

(Stamp) Answered 1-9-17

Dec. 29th 1916.

N. & G. Taylor Company,
Mariner & Merchant Building,
Philadelphia, Penna.

Gentlemen:—

We have your letter of the 27th and have noted very carefully all you have said therein. In reply thereto wish to say that we feel entirely sure that if you were in our position you would consider a total suspension of shipment into eastern territory at this time not only reasonable but absolutely imperative. We are not securing shipments to the extent of twenty-five percent of the amount due us on our contracts with the various refineries in the Oklahoma and Kansas fields. On a large part of this twenty-five percent we are prohibited absolutely from shipping east of the Illinois-Indiana state line. If we were to take even a car or two occasionally and send them as far east as would be necessary in order to take care of your requirements it would jeopardise our chances in a most serious fashion of securing additional shipments of fuel oil from the refineries whose car or cars we had diverted in accordance with your wishes. We positively cannot afford, in order to satisfy any customer, regardless of how much we would like to do so, if, by so doing, we are making it infinitely harder if not absolutely impossible to secure shipments to take care of our other customers.

It is very unfortunate that your plant happens to be located in a territory not favorably situated for the delivery of fuel oil from the western field under the present tank-car and transportation conditions. While we regret all of the circumstances that are making it difficult now for you to secure fuel oil to meet your requirements we cannot feel that we ourselves are in any way to blame for either the tank-car shortage or the railroad congestion, the combination of which has resulted in refineries refusing to ship on our orders with them if we do not agree to restrict the points of destination

to a territory not east of the Indiana-Illinois state line.
223 Our orders were placed with the refineries in good faith and we presume taken by them also in good faith. As a matter of fact, on our orders there is no provision whatever like the one which appears on your contract with us limiting the shipment to the ability of the seller to secure tank-cars in which to make these shipments. In other words, the refineries accepted our orders and agreed to make shipments regardless of conditions. Despite their agreement with us, however, they cannot deliver and we know they cannot deliver for the reason that we have men in the field constantly watching the supply of tank-cars and determining where each car is going.

Certainly, if we cannot secure deliveries from the refineries not even in sufficient quantities to take care of customers in the territory which is not prohibited from receiving shipments, we cannot, under those circumstances, be reasonably expected to make deliveries into a territory against which these restrictions apply, especially in view of the fact that we protected ourselves originally by making our contract subject to our ability to secure tank-cars in which to make the required shipments.

The fact that we are unable to ship you fuel oil under the present deplorable circumstances is no reflection whatever, or at least should be no reflection whatever, on our responsibility. The most responsible business concerns doing business today, however, could not be expected to overcome these obstacles which now exist to the extent which you feel we should overcome them. We have tried to be both specific and clear in our explanation of this entire matter throughout our correspondence with you and we do not believe there is much more that can be said on the subject. We believe that we are doing all for any of our customers that could be expected.

From the inquiries we are receiving daily, it does not appear that any dealers in fuel oil are able, at the present time, to take care of their customers in a satisfactory manner. Our facilities and our ability to secure shipments are just as good, and in fact much better, than most of our competitors. Our willingness and our desire to give our cus-
224 tomers everything to which they are reasonably entitled and everything that they should expect from us is second to none. We took your contract based upon our ability to secure shipments, or rather to secure tank-cars in which to

make shipments, but we have not been able to secure these cars and therefore we must be relieved of the responsibility of making the deliveries. Under the same circumstances you yourselves would not for a moment take it upon yourselves to ship one car to a point of destination that would probably result in your being unable to secure additional cars from the same point of origin and while this condition is one which is most regretable and cannot help but give you concern, we know that if you will consider the matter from our standpoint you cannot very well find reason for just criticism. The conditions are entirely unprecedented and could not be foreseen. If they had been it is very clear that fuel oil would not have been offered by any one four months ago on the basis which it was offered at that time. You well know that neither we nor any other business concern relishes taking orders on which it is impossible to make deliveries. The loss in the matter is not a one-sided one by any means and if we were only able to have the oil shipped which we have bought your desires and requirements would be taken care of in full.

We sincerely trust that you will be able to recognize the strength of our position and will, consequently, conclude that our actions throughout have been fully justified.

Very truly yours,
ANDERSON & GUSTAFSON.
F. E. SPENCER.

FES:I.

(Stamp) Received N. & G. Taylor Co. Philadelphia. Jan 2 1917

225 Mr. Young: Offer as defendant's Exhibit 19 letter dated January 9, 1917, from N. & G. Taylor Co., Philadelphia, to Anderson & Gustafson, Transportation Building, Chicago, Ill.

Said letter, marked Defendant's Exhibit 19, was received in evidence, and is as follows:

226 DFT. X. 19

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia)

January 9, 1917.
Dic. 1-8-17.

Anderson & Gustafson,
Transportation Building,
Chicago, Ill.

Dear Sirs:

Please wire us upon receipt of this letter with reference to the Fuel Oil situation, and the prospect for getting several cars on the way to us shortly. The tank car situation is evidently a temporary one, and if your Shipping Department is on the alert and working in our interests, they should be able to do something to help us out. We are, therefore, anxiously awaiting word from you upon this subject, and remain,

Very truly yours,
N. & G. Taylor Co.

C-29.

227 Mr. Young: Offer as Defendant's Exhibit 20, letter dated January 10th from N. & G. Taylor Company to Anderson & Gustafson.

Witness: Sent it.

Mr. Young read it to jury.

Said document marked Defendant's Exhibit 20 received in evidence. It is as follows:

228 DEFT. X. 20

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia)

January 10, 1917.

Anderson & Gustafson,
Transportation Bldg.,
Chicago, Illinois.

Dear Sirs:

We now have word from eastern representatives of lines operating in the Oklahoma District, that while there has been considerable congestion and shortage of equipment in the

Oklahoma oil fields, the situation is now being cleared, and shipments are moving more expeditiously. While we have not yet received notice of further shipments from you, we trust that you will succeed in getting oil moving to us shortly.

Very truly yours,
N. & G. Taylor Co.

C-29.

229 Witness: Do not recall talking myself to representatives of Oklahoma district at about that time. Got information from our traffic manager in Philadelphia. Traffic manager had telegram or letter from one of representatives in Oklahoma field stating situation easing up in Oklahoma. He was looking into situation to see how bad it was out there. Anderson & Gustafson were talking about Oklahoma district; wanted to check up on that. Five cars were shipped from that district. Do not necessarily expect whole lot to come from that district; bought a lot of that. Did not necessarily expect it to come from there. Expected it from any place where 30 to 32 was obtainable. Can't say I knew where else obtainable at that time.

Mr. Young: The only place you knew where fuel oil from 30 to 32 Baume came from was Mid-Continent field?

Witness: No, because the Baume content was never important to us.

Mr. Young: Did you know that the prices of oil included freight rates from Oklahoma to Eastern points?

Witness: No, the price was the freight to Cumberland.

Mr. Young: They were prices freight allowed to Cumberland?

Witness: I did not know how the freight was allowed.

Witness: Paid freight when oil arrived. One or more cases where prepaid. Think more of them paid by Taylor.

Mr. Young: Well, for example, in the first invoice, Plaintiff's Exhibit 36, dated November 27th, now, this is for one tank car of fuel oil 30 to 32, 9429 gallons, 5¼—495.02; then it says, less freight, 69,775 lbs. at 15 cents, 62,231 lbs. at 27—104.66; 168.02, making the total freight 272.68; is that right?

Witness: Yes. We paid freight to railroad sent Anderson & Gustafson check for $222.34. And if payment was made inside ten days we were entitled to 1% discount on amount charged for oil. 30 days net. Did not notice

230 when invoices came that the freight was published rates from Oklahoma and Kansas field to eastern points; was

no concern of ours. Was simply pricing amount to be paid and checked off amount allowed on invoice. Was checking up situation in Oklahoma district when I wrote the letter.

Mr. Young: Offer as Defendant's Exhibit 21, telegram, January 11, 1917, from Anderson & Gustafson to N. & G. Taylor Company.

Witness: I received it.

Mr. Young read it to jury.

Said document marked Defendant's Exhibit 21 was received in evidence. It is as follows:

231 DEFT. X. 21

(Postal Telegraph Letterhead)

(Stamps) Received. N. & G. Taylor Co. Philadelphia. Jan 11 1917 Answered 1-13-17
30ptx 8 1120a
nh Chicago Ills Jan 11, 17
N G Taylor Co
Pha
Fuel shipments into Far east impossible for present
ANDERSON & GUSTAFSON

232 Mr. Young: Offer as Defendant's Exhibit 22 letter of January 12, from Anderson & Gustafson to N. & G. Taylor Company.

Witness: I received it.

Mr. Young read it to the jury.

Said document marked Defendant's Exhibit 22 was received in evidence. It is as follows:

233 DEFT. X. 22

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago)

Jan. 12, 1917.

N. & G. Taylor Co.,
Philadelphia, Pa.

Gentlemen:

We have your letter of the 10th with regard to the prospect of securing shipments on fuel oil from us in the near future, and will say, in reply that while the situation looks

a little better than it did a few weeks ago, still it is not possible for us to begin to divert any of our cars of fuel in transit as far East as Cumberland.

We have not forgotten your order by any means however, and it is our sincere hope that the tank car and transportation situation will be relieved in the near future, so that we can begin to ship oil to you.

We believe that we have thoroughly explained our position, and the conditions in previous correspondence, and will add nothing more at this time, except to assure you that your needs are not escaping our attention for a moment, and that as soon as we can consistently ship you more fuel oil, we will do so, and will take the greatest of pleasure in being able to do so.

Very truly yours,
ANDERSON & GUSTAFSON.
F. E. SPENCER.

FES:Q

(Stamp) Received N. & G. Taylor Co. Philadelphia. Jan 15 1917

234 Witness (being shown letter January 13): I recall the letter.

Mr. Young: Where did you get information from trade acquaintances referred to in that letter that shipping situation was much better in Oklahoma district?

Witness: Either from local representatives of those western lines operating in that district or from reports received direct from representatives in that section; can't say which. Received some offers for shipments of oil promptly from Oklahoma district at that time. January 13th. As to whether I received letter from Oklahoma District from anyone else would have to refresh my memory from orders received. (Referring to memorandum.) At that time I didn't. Received some fuel oil from Mid-Continent field later. See one purchase in April. Apparently none in January. Nor February. Think not in March. Time referred to in letter is about date letter written. Didn't get any oil although offered prompt shipment several cars from Oklahoma District. I recall letter shown by Mr. Young dated January 18th, 1917, Plaintiff's Exhibit 14.

Mr. Young read letter.

Witness: It was especially for Oklahoma District as well as East. They told me they could get tank cars themselves. Didn't think any distinction was made between railroad

equipment cars or order. Do not know that Santa Fe had more railroad tank cars for shipment of fuel oil than any other railroad in west.

Mr. Young: Did you know Mr. Taylor, at about the time you wrote that letter, January 18th, or within a few days thereafter, the Santa Fe Railroad had an embargo on their cars?

Mr. Beebe: I object. There is nothing in the record that establishes there was any such embargo, and they will never be able to show it.

The Court: Well, go on and answer the question.

235 Witness: No.

Mr. Young: Did you ever know that embargo went into effect the latter part of January?

Mr. Beebe: I object to the embargo as to a conclusion.

The Court: He may answer the question; go on.

Witness: Never. No, never of my own knowledge. Heard rumors of it from correspondence with Anderson & Gustafson. To my recollection I had heard of it from no other source. Do not believe it was a fact.

Mr. Beebe: I object to the assumption that it was a fact.

The Court: Well, of course, that question— I don't think you ought to press it, do you?

Mr. Young: No.

The Court: It may be stricken.

Mr. Young: Offer in evidence as Defendant's Exhibit 23, letter January 22, 1917, from Anderson & Gustafson to N. & G. Taylor Company.

Witness: I received it.

Mr. Young read letter to jury.

Said document marked Defendant's Exhibit 23 was received in evidence. It is as follows:

236 DFT. X. 23

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago)

(Stamp) Answered 1-24-17

January 22, 1917.

N. & G. Taylor Co.,
Philadelphia,
Pa.

Gentlemen:

We are in receipt of your letter of the 18th inst., advising us that Santa Fe Car 96871, was started on its return from Cumberland Md., on January 16th. In this connection we call your attention to the fact that this car arrived at Cumberland on December 23rd, from which you can see that it was held for a period of three weeks before it was unloaded and returned.

We call this to your attention as a concrete instance of the reason that the refineries and the railroads both hesitate and practically refuse to allow their cars at this time to be sent into eastern territory.

The time it takes a car to move from Oklahoma to Cumberland Md., is long enough in itself without having this time increased with a three weeks delay at destination.

Our records show that we urged you not to hold cars shipped by us any longer than was absolutely necessary advising you at the same time that any delay whatever would aggravate the present very delicate situation and we are astonished to find that a car was held at your plant for so long a period.

Very truly yours,
ANDERSON & GUSTAFSON.
F. E. SPENCER.

FES:D.

(Stamp) Received N. & G. Taylor Co. Philadelphia. Jan 24 1917

237 Mr. Young: Offer in evidence letter dated January 24th. Anderson & Gustafson to N. & G. Taylor.

Witness: I received it.

Mr. Young read letter to jury.

Said document marked Defendant's Exhibit 24 was received in evidence. It is as follows:

238 DEFTS. EX. 24

N. & G. Taylor Company, January 24, 1917.
Philadelphia,
Pa.

Gentlemen:

Supplementing our letter of the 22nd, wish to say that the writer's attention has been called to the fact that Santa Fe Car 95226, was delivered to you on December 11th, but was not returned by you until January 2nd. This is another example of the reason why it is difficult to make shipments into your territory at this time.

Very truly yours,
ANDERSON & GUSTAFSON.

FES:D.

239 Mr. Young: Offer letter January 24, 1917, from N. & G. Taylor Company to Anderson & Gustafson.
Witness: It is reply to that letter.
Mr. Young read it to jury.

Said document marked Defendant's Exhibit 25 was received in evidence. It is as follows:

240 DEFT. X. 25

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia)

Anderson & Gustafson, January 24, 1917.
Transportation Building,
Chicago, Ill.

Dear Sirs:

Replying to your letter of January 22nd, we knew that there were some delays in getting the first cars unloaded at Cumberland on account of difficulties in starting our new oil equipment, but we did not know that there had been such a delay as you report. We are taking this up at once with Cumberland, asking them for verification. This, however, should not be held up against us as a regular thing, as our full storage capacity has since become available and cars are being unloaded the day they are received. This has

been our practice for some time past, and will be so in future, provided your shipments are made with fair regularity.

Very truly yours,
N. & G. Taylor Co.

C-29.

241 Mr. Young: Offer letter February 17th, Anderson & Gustafson to N. & G. Taylor.

Witness: It was received in regular course of business.

Mr. Young read it to jury.

Said document marked Defendant's Exhibit 26 was received in evidence. It is as follows:

242 DEFS. EX. 26.

(Letterhead of Anderson & Gustafson, Petroleum and Its Products, Chicago.)

(Stamp) Answered 2-23-17.

February 17, 1917.

N. & G. Taylor Co.,
Philadelphia, Pa.

Gentlemen:—

Under date of January 24th, you wrote us in reply to our letter of January 22nd, stating that you would investigate this delay surrounding the return of Santa Fe 96871 and that you would report to us after the information we gave you would be verified.

Up to the present writing we have had no further word from you, neither have we had a reply to our letter of January 24th, in which we called your attention to the delay in the handling of Santa Fe 95226.

It was delays of this kind that caused the Santa Fe Railroad Company to issue a strict embargo, effective February 1st, refusing to allow any of their cars to go off their own rails while the present conditions exist. Your company and others who delayed cars in this manner are responsible for the action of the Santa Fe Railroad Company, and consequently you should not need to go out of your own organization in an effort to find a reason for the difficulty you are having in securing deliveries at Cumberland Maryland, at this time.

Your failure to give us any real explanation and in fact

to give us any reply whatever, to our letter of January 24th, is a very clear indication to us that the cars referred to were detained in a very unreasonable fashion and that you are unable to justify the delay even after having given the matter a careful investigation. You certainly can not reasonably find fault with the railroads or the refineries for objecting to send cars to a point where they receive the treatment you gave the cars already sent to you.

Very truly yours,

ANDERSON & GUSTAFSON.
F. E. SPENCER

FES:D.

(Stamp) Received N. & G. Taylor Co., Philadelphia. Feb 19 1917.

243 ANDERSON & GUSTAFSON SHIPPED A/C CONTRACT

1916			Rec'd	Unloaded	Returned	
11/27—	SF	95226 V	12/11 V	1/2 V	1/2 V	21 days
" —	GCSF	8147 V	12/11 V	No record V	12/30 V	18 "
11/28—	SF	99871 V	12/21 V	" V	1/16 V	25 "
11/30—	F	190100 V	1/22 V	1/23 V	1/23 V	

244 Witness: My letter of the 20th inst., referred to in Exhibit 27, is Plaintiff's Exhibit 15.

Mr. Young read last paragraph.

Defendant's Exhibit 27 received in evidence and is as follows:

245 DEFTS. EX. 27.

March 22, 1917.

N. & G. Taylor Co.,
Philadelphia, Pa.

Gentlemen:

Replying to yours of the 30th inst., will state that we are prepared to give evidence to prove our claim that shortage of tank cars made it impossible for us to deliver Fuel Oil to you.

Should you be fortunate enough to present your side of the case to better advantage than we can ours, we would be glad to pay the amount of the judgment, but the case will have to be tried in a legal manner.

Very truly yours,

ANDERSON & GUSTAFSON.

JAA/H

246 Witness: After March 20th gave no further shipping directions to Anderson & Gustafson.

Redirect Examination by Mr. Beebe.

Witness: Company was incorporated February 1, 1917. New Company took over assets and liabilities of partnership. Corporation succeeded to all assets and liabilities of partnership. Two partners were sole stockholders of new corporation. Were W. W. Justice and myself.

Mr. Beebe: Now you answered Mr. Young that when these cars arrived your fuel capacity was taken up. Was that taken up by any other cars than those you purchased November 17th—those you ordered November 17th?

Witness: Yes. There were two cars ordered from another source November 1st. They were coming in about that time and some of the cars that we purchased elsewhere had been coming by that time too.

Mr. Beebe: You mean what cars; those purchased November 17th?

Witness: Yes, I think that is the next. There were no other cars purchased save those purchased November 17th. They were there in December when these cars commenced coming in. So that these few cars, with the exception of the car purchased November 1st, were purchased after I received telegram of November 17th. After I received letter January 11, stating Anderson & Gustafson could not furnish any fuel oil, went out and purchased more oil. Made purchases January 15th and 17th. Asked for quotations before purchasing. Followed usual practice and sent out inquiries. Time was very short. Had come against possibility of shut down.

Mr. Young: Objection. Not responsive to question. Move to strike out.

247 Court: Stricken.

Witness: Did not have time to send to Oklahoma for oil at that time. Had to get oil from other sources. Did not get oil from Oklahoma. Did not go out and get Mexican oil as suggested in January 11th letter. Bought some Mexican oil at some time. It was not in general suited to purpose. Oil secured for plant was delivered in tank cars. First car from Anderson & Gustafson was not in railroad equipment car. Was in car of General American Tank Car Corporation. GATX, a rental car. When delayed in unloading railroad charged demurrage after free time to shipper. Unloaded

fifth car from Anderson & Gustafson day after received. Practice was to unload them promptly within time allowed. Within 48 hours.

Recross Examination by Mr. Young.

Witness (being shown memorandum by Mr. Young): It is apparently memorandum made by one of our office clerks. Gives approximately number of days it took to unload the four cars. Took 21 days to unload first. Next 18 days. Third 25 days. Last within time allowed. The Following day. First car was GATX car. Other four in railroad cars.

Mr. Young: Now you state that you bought two cars oil on November 1st and was that a part of the oil that was in storage at the time you shut down in December?

Witness: A hard question to answer accurately because couldn't tell just what oil in those tanks. Bought two cars November 1st; two cars November 17th, and other November 17th. Tank held 100,000 gallons, not quite a month's supply. Tank was full when cars arrived December 4th. Whether oil that was put in there November 1st had been used up and replaced by oil that came in shipments on November 17th, couldn't answer that. Did not buy more oil between No-
248 vember 1st and 30th. Didn't get any Anderson & Gustaf-
son until December 4th. Tank cars held 8000 to 10,000 gallons. These five cars would have been 40 to 50,000 gallon and tank holds 100,000 and tank was full. Other oil must have come from previous purchases. There was fifteen cars purchased November 17th from outside sources and two cars prior to that, making seventeen cars altogether. Can't say offhand when delivered. Would have to consult records. Enough were delivered so that at end of month had more oil than could take care of. Shut down stopped use of oil so shipments commenced to pile up. Think none of that oil came from Mid-Continent field. Do not know where it came from because in most cases were simply billed as fuel oil. Did not come from Pittsburgh or Oil City. Bought from local concerns. The Sun Company, Atlantic Refining Co. and Union Petroleum Company may have oil from any field sent in there and partially refined. Crude might have come from many fields. Think in all cases oil was refined in Philadelphia. Would have to refer to invoices to make sure. But that is my best recollection. Made some purchases January 15th and 17th. Five cars from Union Petroleum, five from

Sun Company, five from Atlantic Refining Co. All Philadelphia concerns. Offices in Philadelphia. Does not follow, however, that it came from Philadelphia because these people do countrywide business.

249 Those people control the products, as I understand it, of other refineries in different parts of the country. I have card showing records of purchases, but it doesn't show the kind of oil.

250 JOSEPH J. MULVEY, recalled on behalf of Plaintiff, further testified upon Direct Examination by Mr. Beebe as follows:

Has been sworn. Has been on witness stand before in this case. From November 1, 1916 to June 30, 1917 was connected in a business way with The Atlantic Refining Company. Position was Assistant to the Manager of the Fuel Oil Department. Was at that time familiar with market with relation to fuel oil. My familiarity extended primarily over the Philadelphia and Pittsburgh district, but at same time had to be conversant with Mid-Continent situation, due to fact oil was coming in large quantities and was necessary to know that in order to compete with it. Atlantic Refining Company refined oil. Largest refinery at Philadelphia. We have one at Franklin, Pennsylvania, in heart of Pennsylvania oil region. One at Pittsburgh and one at Brunswick, Georgia. At Philadelphia we were at that time refining small amount of Pennsylvania crudes, quite a large amount of Mexican crudes, some Texas crude and great deal of Oklahoma crude. At Franklin were refining Pennsylvania and Oklahoma. At Pittsburgh were refining Pennsylvania and Oklahoma. Plant at Brunswick was not built until, I think, 1918. Received "domestic," that is, Pennsylvania, crude, everything in the United States with exception of Texas, by pipe line. Texas crude transported in tank steamers, Mexican also—to Philadelphia refinery. To Franklin and Pittsburgh refineries it is all pipe line. In the course of my business I kept acquainted with market situation. Had knowledge, at that time as to sale values, market price, fair cash market price of various kinds of fuel oils. Have, since I was on stand, refreshed recollection on market value of 30-32 fuel oil for period between November 1, 1916, and June 30, 1917. Can now tell market

value for each of months between November 1, 1916 and
251 June 30, 1917, for fuel oil, 30 to 32 Baume, f. o. b. tank cars refinery, with freight allowed to Cumberland, Maryland. Cannot answer as to price of such oil during November, 1916, without referring to price schedules which I have with me. I have our price schedules that we had in effect during that interval (producing certain documents). They were made at the dates up at the top of them. I made them. They are originals. These are the price lists of the Atlantic Refining Company at the days mentioned. Prices at which we were quoting oil for sale. Do not have knowledge of market value only from what is one these schedules; know it from actual competition with other companies. Made sales myself at that time. Prices on these lists are quoted prices of Atlantic Refining Company. Their open price schedules for dates enumerated at the top. I made these price lists in 1916. The price on November 29, earliest date I have here—the market value—was 6.36, Cumberland, Maryland, freight allowed. Six and thirty-six hundredths cents per gallon. Freight allowed to Cumberland, Maryland, December, 1916, same price under same conditions. January, 1917, same price to January 11. After January 11 was equivalent to 7.36. February, 1917, same price. March, 1917, same price. First two days in April price was 7.36; on and after April 3 was 8.11. To May 10, was 8.11; after May 10, was 8.61. By saying equivalent to I mean that was the fair cash market price at that time. Eight and sixty-one hundredths cents. Freight allowed to Cumberland, Maryland. June, 1917, same price. 8.61 per gallon in each case.

Cross-Examination by Mr. Young.

I live in Philadelphia. Have lived there since October, 1913. Employed by Atlantic Refining Company since March 17, 1912. All time I was in Philadelphia I worked for the Atlantic Refining Company. Nobody has paid my expenses to come to Chicago to testify in this case, except train fare. No other
252 expenses paid except few lunch bills. Came at Plaintiff's instance; was subpoenaed. Right here. Plaintiff brought me here. Originally received instructions from company through I understand Mr. Taylor's Philadelphia attorneys. Superior officer told me to come. Never discussed pay. Have been in consultation since coming to Chicago with attorneys for plaintiff and Mr. Taylor. Thirty-six years old. Not in

service. In 1916 was twenty-seven. Was married then. Was in class 4-A. Was Assistant to Manager of Fuel Oil Department at that time. Have personally to do with making sales. When asked about market price of 30-32 fuel oil had in mind particular kind of fuel oil, other than gravity. Low sulphur. Doubt if there is any real "no sulphur"; nearest approach to it is from Pennsylvania crude. Practically free from sulphur. "Low sulphur" means under one-half of one per cent. Am familiar with process Atlantic Refining Company had in use in 1916 in handling crude oil. Was in Refinery Department before going into Sales Department. It was distillation, all of it, except in finishing. At Philadelphia made small percentage of Pennsylvania, quite large amount of Mexican, Texas and Oklahoma; whether others I cannot recall. At Franklin and Pittsburgh were refining both Pennsylvania and Oklahoma crudes. Mexican comes only to Philadelphia. At Philadelphia we refined both Oklahoma crude and Pennsylvania crude. Oklahoma crude came through pipes from Oklahoma to Philadelphia, has come that way for years and still does. Got Pennsylvania crudes same way, but not for Philadelphia. All our Oklahoma. They were refined separately; all crudes kept separately, from different bases. From Pennsylvania crude got gasoline, refining oils, fuel oils, neutral oils and cylinder stocks. Gravity from straight Pennsylvania crude would run up around 36 to 40, 38 or 39 I would say on an average. Straight distillation, that fuel is lighter than fuel made from Oklahoma crude. Can get anything desired in blended oils. Got lubricating oils; that is what Pennsylvania crude is run for primarily. And then we got fuel oil.

Original distillate has gravity of 38 to 42, but we cut it
253 back and ship out 26 to 30, 28 to 30. The fuel oil at that stage is about three degrees lighter on general average than we get from Oklahoma crude. From Oklahoma crude get gasoline and refined oils,—fuel oil. Get lubricating oils. In process of refining. And get fuel oil. Gravity of it depends on how refiner is situated, what he wants to run, to finish. I have known Oklahoma fuel oil to range anywhere from 30 to 34 or 35 gravity; all depends on how he wants to finish it. Lower gravity oil has greater heat unit, regardless of the crude. Oklahoma fuel would have greater fuel units than Pennsylvania crude per gallon. Steel plants in western part of Pennsylvania would get bulk of oil from Mid-Continent field. Eastern part would not. Cumberland, Maryland, is between both of them. Have never had experience down in

Mid-Continent field. Have not personally made purchases or sales down there. Company has. Purchasing Department takes care of that. Was quite a demand for oil during period from November, 1916, to following summer. But nothing like after we got into the War. Then it got worse. Was getting bad then. Price commenced to go up about November 1, as I recall, went up steadily five or six months, then slumped off, and then started real rise, until it hit peak sometime in 1920, as I remember. Could not testify as to fair market price of Oklahoma crude oil in November 1916. Do not keep in mind any crude prices for any particular time. Have no recollection now so that can state fair market price of Oklahoma or Kansas crude oil during any period from November, 1916, to June, 1917. Could not testify as to fair market price during that period of Oklahoma or Kansas fuel oil in Mid-Continent field before loaded into tank cars. Was difference between value in storage tanks and value loaded in tank cars. Difference was usually for car rental. Added what they had to pay for tank cars to what they had to pay refinery for it. Price greater when loaded in tank cars than before. Before oil had started on its trip. Seller had to protect self.
254 Have heard expressions "Seller's cars," and "Buyer's cars?" Former is price in which seller supplies cars, latter where buyer supplies cars. There was a difference, at least there should be. Do not know how much it was in November 1916. All our tank cars are leased from Union Tank Line Company. Atlantic Refining Company does not own its own cars, except few used in own yards. All cars leased. Company controls where they go while under lease. Can load them and ship anywhere they wish. Was no shortage developing in fall of 1916, compared to what happened afterwards. We didn't have much trouble getting cars. We shipped empty cars to Oklahoma to get them filled and brought them into Pittsburgh district. That was not only way we could get Oklahoma fuel oil in; we bought several hundred thousand barrels in, in both our and seller's cars. Brought them in railroad cars. Had pretty nearly every description on earth. Can't say whether we had Santa Fe cars after January 31, but we had Santa Fe cars. During the winter. Have no record of how late. But I know we had Frisco, Santa Fe and all small refiners' cars coming into Pittsburgh, Johnstown, and even several trainloads into Philadelphia. Was plenty of Oklahoma and Kansas fuel oil in Pittsburgh district all through that winter. Trains would come into Pittsburgh, and

they couldn't sell them. And next day price would jump right up. So consumer could have gone out in open market and bought all Okahoma fuel he wanted to. Two grades, light and heavy, were coming in. Could have bought either. Some Pittsburgh steel manufacturers got very badly bitten. Bought heavy and couldn't use it. As low as 24 or 26 gravity, where wax distillate was not removed. They did not need 30 or 32 to be burned to advantage if they could heat it. If they didn't heat it cold test was very high and they would get into trouble. Didn't have to have practically no sulphur; a half of one per cent. would not bother. If they had one per cent. sulphur would not affect steel if they had right kind of plant to use it. Price of 6.36 per gallons for 30 to 32 Baume fuel 255 oil in November, 1916, was equivalent to 1.01 for freight, and ten points for car rental. One-tenth of a cent per gallon for car rental. Difference would be 5.25. Five and a quarter. Price located at Philadelphia refinery. Do not know fair market price of same oil at that time in Eldorado, Kansas, unloaded into car. Do not know what car rental down there was. Price of 6.36 for December was same process, same freight allowance, same car rental. Right through, all those prices would be the same. And difference is, f. o. b., the oil, at Philadelphia. That is true of all these quotations November to April. Have figured simply freight rate and car rental from Phialdelphia to Cumberland. Pay per diem charge for car rental to Union Tank Line Company. Figured it this way—had a flat price of one-tenth of a cent per gallon, based upon an average movement of tank cars, say of eight thousand gallons capacity, and it worked out approximately a tenth of a cent a gallon; made flat charge whether car went three hundred miles or thirty miles. Would hardly say would be same if sent car a thousand miles. We would probably protect ourselves on that. Cannot recall what car rental was at that time; was flat charge, a loading charge and per diem charge; somewhere around three dollars for loading and two dollars a day; afterward changed to per gallon basis, somewhere around 18 or 19. Do not know just how much it would figure out per car per month. Didn't figure it that way. Just had a flat charge. Cars circulated around in Pennsylvania district. Tried to keep them without reasonable haul. Would ship from Pittsburgh or Franklin refinery to customers in vicinity of Pittsburgh. Would not ordinary ship from Philadelphia into Pittsburgh district, or vice versa. Franklin is about 125 or 150 miles from Pittsburgh. Is right

in heart of Pennsylvania oil region. Refineries were so located that our cars had comparatively short hauls. With those short hauls figured flat rate of one-tenth of a cent a gallon for use of car for haul. Do not know just how
256 it was computed. You take published freight rate, add to that one-tenth of a cent a gallon and then the f. o. b. price at refinery at Philadelphia and figure price to any point. That would circulate alll through Pennsylvania and Maryland, would figure freight rate from refinery from which shipped. In answer to Mr. Beebe's hypothetical question had in mind Philadelphia refinery when said "f. o. b. refinery." Figured from that. Made no distinction whether fuel oil was distilled from Oklahoma or Pennsylvania crude so long as it was low sulphur. Regardless of gravity. Did then and still manufacture a Mexican distillate, of about 30½ or 31 gravity, which I did not consider because it is usually a little lower in price. On first schedule it is half a cent a gallon lower. On second only quarter of cent lower. On third same. On fourth, a cent. On fifth a cent. On sixth, July 5, half a cent. It is not the same otherwise as fuel mentioned. Is higher in sulphur. But heat units would be practically the same. Would be suitable for burning for certain purposes, but not for others. Schedules I have are price lists Atlantic got out after surveying market on those days. And after figuring out supply and demand that was the prices we scheduled and quoted to customers. And made sales at those prices. Am confining testimony entirely to Philadelphia.

Redirect Examination by Mr. Beebe.

Was married October 1, 1913. In 1916 and 1917 had children.

The Court: I do not think there is any question about it; I think he had a perfect exemption.

Mr. Young: I move to strike out witness' testimony on ground his values are as to fuel oil f. o. b. Philadelphia refinery, and that is no evidence as to fair market value of oil in question, under the contract.

The Court: Overruled, and I will allow you an exception for the present.

257 HOLLINGSHEAD N. TAYLOR, Recalled as witness for Plaintiff, having been previously sworn, testified further upon Redirect Examination by Mr. Beebe:

Witness: Have seen before, received in regular course of business, the letter shown by Mr. Beebe from Anderson & Gustafson Chicago, dated March 5th. Received at Philadelphia, March 7th.

Thereupon four letters were received in evidence, marked Plaintiff's Exhibits 1, 2, 3 and 4 as of May 14th, 1924. They are as follows:

Pl. Ex. No. 1.

258 PL. EX. NO. 1

As of May 14, 1924.

(Letterhead of Anderson & Gustafson, Dealers in Petroleum and its Products, Chicago.)

(Stamp) Answered 3-7-17.

March 5, 1917.

N. & G. Taylor Co.,
Philadelphia, Pa.
Gentlemen:

Replying to your letter of the first inst. which had reference to Mr. Taylor's conversation with Mr. C. O. Beroth, wish to state that your letter did not reach us until Mr. Beroth had left the city again on a trip that will keep him away from our office for at least three or four days.

For your information, will say that Mr. Beroth advised us at the time he was in our office, which was only for a few moments that he had talked with you, and that you had promised to supply him for certain information with regard to cars already used by you. At lease, that was the writer's understanding of what was to be supplied. However, there appears to be no evidence of this information in your letter of the first.

He did not make any mention to us with regard to supplying, or agreeing to supply you with any particular quantity of oil before March 20th at Cumberland, Md. We cannot tell from your letter whether you mean for us to understand that this arrangement was either asked for or promised. We cannot believe that it was promised, for the reason that as we

look over our records, we can tell at a glance that there is no chance whatever of our delivering eight cars of fuel oil to you, or in fact any part thereof at Cumberland, Md. by the twentieth of March.

As soon as Mr. Beroth returns, we shall refer him to
259 your letter and to our reply, and he doubtless will let you hear from him with regard to this matter.

Very truly yours,

ANDERSON & GUSTAFSON
F. E. SPENCER.

FES:Q

(Stamp) Received, N. & G. Taylor Co., Philadelphia, 12:15 p. m., Mar. 7, 1917.

260 PL. EX. NO. 2 Pl

As of May 14, 1924.

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia.)

February 23, 1917.
Dic. 2-22-17.

Anderson & Gustafson,
Transportation Building,
Chicago, Ill.

Dear Sirs:

Replying to your letter of February 17th, investigation of the delay in the return of Santa Fe car #96871 showed, as we expected, that this was due to difficulties in getting our new oil equipment started, which held us up considerably beyond the date we expected to be running on oil. As this was the first introduction of oil as a fuel in our plant, we ran into some troubles which took time to overcome. After getting the fuel equipment started, our shipments have been unloaded more promptly, as you will note by the record on car F. #190100, received January 22nd, unloaded January 23rd, and returned the same day.

We wish to call your attention to the fact that our correspondence with you shows that you had declined to make shipments before these cars were received at Cumberland, so that your reference to these delays appears to be more of an excuse than a reason for the suspension of deliveries to us.

We have had this matter of car supply, etc., up personally

with representatives of the interested roads, one of whom from the Tulsa district called upon us at this office recently, and have evidence that the responsibility for your failure to carry out your contract obligations to us cannot be placed entirely upon the railroads.

We, therefore, reaffirm our former position, and will shortly render you statement of the excess charges we have been obliged to pay through your default on the contract.

Very truly yours,

N. & G. TAYLOR CO.,
H. N. TAYLOR,
President

Pls return to H. J.
C-29.

Pl. Ex. No. 3

261 PL. EX. NO. 3

As of May 14, 1924.

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia.)

March 1, 1917.

Anderson & Gustafson,
Transportation Bldg.,
Chicago, Ills.

Dear Sirs:

Referring the writer's conversation with your Mr. C. O. Beroth at the Bellevue-Stratford Hotel last evening, we find in looking over our records that we can take eight to ten cars of oil from you, provided you can get them to Cumberland prior to March 20th. Please look into this matter at once and telegraph us whether or not it will be possible for you to make this delivery.

If not, we shall be obliged to go into the market again with another purchase at the current price, in order to keep our plant in operation.

Very truly yours,

N. & G. TAYLOR CO.,
H. N. TAYLOR,
President.

C-29.

262 PL. EX. NO. 4

As of May 14, 1924.

(Letterhead of N. & G. Taylor Company, Manufacturers of Tin Plate, Philadelphia.)

February 15, 1917.
Dic. 2-14-17.

Anderson & Gustafson,
Transportation Bldg.,
Chicago, Ill.

Dear Sirs:

Supplementing our letter of January 18th, we are still without any notice of further shipments from you and are, therefore, obliged to make additional purchases of oil from other sources, at prices higher than your contract with us, and as you have failed to show any disposition to live up to your obligations to us, over the past month or two, we shall charge against you the excess cost we are obliged to pay for this oil from other sources. In the meantime, that we may properly regulate our purchases, we should hear from you at once as to what you expect to do for us under this contract during the course of the next four weeks.

Very truly yours,
N. & G. Taylor Co.
H. N. Taylor,
President.

C-29.

263 Mr. Beebe read Plaintiff's Exhibits 1, 2, 3 and 4 of May 14th to the jury.

Witness: I had a talk with Mr. Beroth in Philadelphia at the Bellevue-Stratford Hotel; he represented Anderson & Gustafson. The date was the latter part of February.

Mr. Beebe: Offer Postal telegram February 28th, 1917 from Anderson & Gustafson to N. & G. Taylor Company, Philadelphia.

It was agreed that the pencil writing thereon was out of it.

It was marked Plaintiff's Exhibit 5, May 14th, 1924, and is as follows:

264 PL. EX. NO. 5.

As of May 14, 1924.
(Postal Telegraph Letterhead.)

117prx11 312p.
pr Newyork Feb 28, 17
N & G Taylor Co
Phila

If possible please see Mr. Beroth at Bellevue Stratford seven tonight.

ANDERSON & GUSTAFSON.

(Stamps) Answered 3-1-17. Received N. & G. Taylor Co., Philadelphia, 4 p. m., Feb 28 1917.

265 Mr. Beebe read Plaintiff's Exhibit 5 as of May 14, 1924 to the jury.

Witness: Recall the receipt thereof and know where the Bellevue-Stratford is. Mr. Beroth said he represented Anderson & Gustafson. I recall the conversation. As near as I recall it, Mr. Beroth said they had been unable to deliver oil on account of difficulties in securing cars and transportation congestion generally. Was sorry they had been unable to do better than that. That was the gist of the talk. Mr. Beroth said they hoped to get several cars forward shortly. Didn't make definite promise of date of shipment. Said they hoped to get further shipments shortly. I do not recall that I had any other conversations between February 21 and March 20 with any other members of Anderson & Gustafson firm. Think I had none over telephone. We were co-partnership before the first of February. On February 1st started to do business as a corporation. February 1, 1917. Members of firm were William W. Justice and myself, surviving partners. Were doing business as partners at Cumberland, Maryland, with general offices in Mariner and Merchant Building, Philadelphia. After became a corporation, plant continued in Cumberland and general office in Mariner and Merchant Building, Philadelphia. Made no change in employees. That includes all persons who represented this company with the public or with contracts or with anything of that character. No change whatever in management of corporation. I was executive head of partnership. I was president of corporation. Licensed to do business in New York, Illinois and Pennsylvania.

Co-partnership ceased to exist January 31, 1917 and final steps for culmination of the incorporation took place as of February 1st, 1917. No buildings were put up by the corporation which was entered into February 1st, for some months. So far as management went, stepped into exactly the same plant that partnership had. With the same equipment precisely. Incorporators were myself, Mr. Justice
266 and I think Mr. Banks, Secretary and Treasurer. Surviving partners were H. N. Taylor and William W. Justice, Jr. They, with Mr. Banks, were the incorporators of N. & G. Taylor Company. Not sure whether Mr. Banks or Mr. Helmer, General Manager. First and only stockholders were Mr. Justice and myself. We held all common stock of the company. Had three directors. Third was Assistant Secretary and Treasurer, who was also General Manager of plant. Mr. Helmer owned no stock. Not clear on that point. Was over eight years ago. Incorporated under laws of Maryland.

Mr. Young: Was Henry F. Drinker the man?

Witness: No.

Mr. Young: Did Mr. Drinker not as trustee hold 44 shares of common stock?

Witness: That was private agreement between Mr. Justice and myself. It was my stock. It was in Mr. Drinker's name but he didn't own it. He was trustee. He had no voting power. Simply held to vote as I should direct. Could not sell it. Was trustee for me. Mr. Drinker held it and voted as I directed. He wasn't one of incorporators.

The Court: Was there any other officer or stockholder beside these two partners and this attorney?

Witness: There was another officer of the corporation who was general manager at Cumberland, with title of Assistant Secretary and Treasurer. The Vice-President was Mr. William W. Justice, Jr. Office of Secretary-Treasurer was in one person, Mr. D. W. Banks. Fourth officers was Assistant Secretary. Same Assistant Secretary-Treasurer had been with us prior to time of incorporation. Had performed same duties he did afterwards. Same way with Secretary-Treasurer.

267 Mr. Beebe: Offer this paper in evidence.

Witness: Identify document as agreement between partnership, Hollinshead N. Taylor, William W. Justice Jr., and new corporation, N. & G. Taylor Company, dated January 31st, 1917.

Said document was received in evidence marked Plaintiff's Exhibit 6 as of May 14th, 1924. It is as follows:

268 (AGREEMENT)

"Agreement dated January 31, 1917, made in Cumberland, Maryland, between Hollinshead N. Taylor and William W. Justice, Jr., (hereinafter called Taylor and Justice) of the first part, and N. & G. Taylor Co., Incorporated, a Maryland corporation (hereinafter called the Company), of the other part.

The firm of N. & G. Taylor Company consisted in 1915 of Nathan A. Taylor, Hollinshead W. Taylor, Hollinshead N. Taylor and William W. Justice, Jr., operating under a partnership agreement dated December 31, 1914, a copy of which is annexed hereto. Nathan A. Taylor died April 26, 1915, and the three survivors elected to take over the business as of December 31, 1915, and formed the 1916 firm under a new partnership agreement dated December 31, 1915, a copy of which is also annexed hereto.

On July 7, 1916, Hollinshead W. Taylor died, and in accordance with the partnership agreement the 1916 partnership continued until January 31, 1917, the Estate of Hollinshead W. Taylor continuing liable until that date for the firm debts and entitled to share its profits in the agreed proportions.

The final figures for settlement between the 1916 firm and the Nathan A. Taylor Estate were not agreed upon until
269 the execution of the Agreement of December 30, 1916, a copy of which is also annexed hereto. The Company is the corporation contemplated by such agreement.

Under the two partnership agreements, the two estates were entitled to receive in kind from the respective surviving partners the respective shares of the deceased partners in the stock of the Maryland Sheet & Steel Company in proportion to their respective contribution of capital, with the right of the survivors in each instance to take over any part of such stock at $205 per share. The number of shares of such stock receivable by the Nathan A. Taylor Estate under the said Agreement dated December 30, 1916, was 1,450 shares and the number of such shares receivable by the Hollinshead W. Taylor Estate proportionate to the capital of Hollinshead W. Taylor is 1064 shares.

The two estates have agreed to accept, in lieu of their right to receive on an accounting by the surviving partners the above shares of the Maryland Sheet & Steel Company, shares of preferred stock of the Company, at a valuation for such Maryland Sheet & Steel Company stock of $205 per share, this being the reasonable value of such stock as previously agreed on by all the parties and being its present reasonable value. The Nathan A. Taylor Estate is thus to receive 2,972 of such preferred shares and the Hollinshead W. Taylor Estate 2,181 shares.

In addition to such stock the Nathan A. Taylor Estate is now creditor of the surviving partnership to the amount of $107,046.35, and the Hollinshead W. Taylor Estate to an amount represented by his capital plus his profits under the 1916 agreement, the amount of which has not yet been ascertained and agreed upon and cannot be for some time yet.

Taylor and Justice have caused the incorporation of the Company to take over the business and assets of the 1916 partnership at the expiration thereof at the end of January 31, 1917, and after the profits of the 1916 partnership have been withdrawn therefrom, subject to all its obligations
270 except the duty to deliver to the Estates of Nathan A. Taylor and Hollinshead W. Taylor the 2,972 and 2,181 shares of preferred stock to be received by them respectively as above stated.

The assignment, transfer and conveyance effected by this agreement will be supplemented by proper deliveries, assignments, transfers and conveyances to pass title to various items of real and personal property comprising the firm assets.

In consideration of the issue to Taylor and Justice of the entire capital stock of the Company consisting of 6,250 shares of preferred stock and 1,750 shares of common stock, to be issued to them or to such persons and in such proportions as they may direct, and of the further agreement of the Company hereinafter set forth, Taylor and Justice hereby bargain, sell, convey, release, assign and transfer to the Company all their right, title, interest, claim and demand to the assets, business, good will, trade name and property of every kind and wherever located of the partnership heretofore conducted under the name of N. & G. Taylor Company, including their right to take over such firm assets as against the Hollinshead W. Taylor Estate on the terms provided in said 1916 partnership agreement, Under and Subject to all the

obligations of the partnership heretofore conducted to the effective date of this assignment, including the obligation to the Nathan A. Taylor Estate remaining under the said agreement of December 30, 1916 other than the obligation to transfer to said Estate 2,972 shares of the preferred stock of the Company which latter obligation is to be satisfied by Taylor and Justice out of the preferred stock issued to them hereunder, including also the obligation to account to the Hollinshead W. Taylor Estate in the manner and at the times provided in said 1916 partnership agreement for the share of Hollinshead W. Taylor in the capital and profits of the 1916 partnership other than the right to receive his proportionate share of the capital stock of the Maryland Sheet & Steel Company, which latter right is to be satisfied by
271 the delivery by Taylor and Justice to the Hollinshead W. Taylor Estate 2,181 shares of the preferred stock issued to them hereunder; Excepting and Reserving to Taylor and Justice their respective shares of profits under the 1916 partnership, part of which has already been paid to them on account, the balance of which will be returned to them respectively as soon as the same can be escertained, and no part of which is intended to be transferred to or become the property of the Company in pursuance hereof.

The Company further agrees to assume and be liable for all obligations of the partnership of 1916 and of any previous partnership of N. & G. Taylor Company to which it has succeeded, mediately or immediately, except as above provided.

This agreement shall take effect as of the end of January 31, 1917, and the delivery hereof shall be made and shall become effective in Cumberland, Maryland.

In witness whereof the parties have duly executed this Agreement, Taylor and Justice on January 30, 1917, and the Company on January 31, 1917.

HOLLINSHEAD N. TAYLOR
WILLIAM W. JUSTICE, JR.
N. & G. TAYLOR CO., Incorporated
By H. N. TAYLOR,
President.

Attest: L. L. HELMER
Assistant Secretary.

272 Upon Mr. Beebe's request and Mr. Young's agreement—

The Court: With the understanding that original letters

considered in evidence but the copy may be substituted for the original in the record.

Witness: The contract is set forth in the Minute Book of the Proceedings of the corporation shown by Mr. Beebe. (Referring to page 22 thereof). This is a copy of the agreement of January 31, just identified, Plaintiff's Exhibit 6, of May 14, 1924.

Thereupon, Mr. Beebe read portions from page 23 of the Minute Book.

273 Witness: Hollinshead W. Taylor was my father. He died in July, 1916. Company passed resolution in accordance with contract just exhibited. (Witness' attention being called to page 44): That is the resolution passed by the company. I was present when it was passed.

Mr. Beebe then read from resolution of the Board of Directors apparently as of January 26, commencing on page 42 of the Minute Book, in which resolution the corporation was authorized to make the agreement of January 31st, which is as follows:

274 On motion of Mr. Bates, duly seconded, it was unanimously

Resolved: That in the opinion of the Board of Directors the value of the property and rights to be acquired by the Company under the foregoing agreement is at least $800,000.

Further Resolved: That the proper officers of the Company be and they are hereby authorized and directed to execute and deliver in Cumberland, Maryland, the said agreement as the act of the Company for the purposes therein set forth.

Further Resolved: That the Company issue to Hollinshead N. Taylor and William W. Justice, Jr., or to such persons and in such proportions as they may designate, in pursuance of the terms of said agreement, 6,250 shares of the preferred stock and 1,750 shares of the common stock of the Company.

Further Resolved: That checks on the bank accounts
275 of the Company shall be valid only when signed by any two of the Company's officers, to wit:—

President
Vice-President
Secretary-Treasurer
Assistant Secretary-Treasurer,

provided that one of such two persons signing such checks shall be either the President or Vice President.

Further Resolved: That the President or Vice President of this Company are hereby authorized to effect loans at any time or times for this Company, from any bank in Philadelphia, New York or Cumberland, and as security for the repayment of such loans to assign, transfer, endorse and deliver, either originally or in addition or substitution, any or all stocks, bonds, rights and interests of any kind in or to stocks or bonds, certificates of such rights or interests, deposits, accounts, bills receivable and other commercial paper and evidence of debt, at any time held by this Company, and for such loans to make, execute and deliver one or more notes or other written obligations of this Company, on such terms, and with such provisions as to the securities and sale or disposition thereof, as they or he shall deem proper; also to sell to, or discount or rediscount with such bank any and all commercial paper, bills receivable and other instruments and evidences of debt at any time held by this Company, and to that end to endorse, transfer and deliver the same.

Further Resolved: That H. N. Taylor, President, William W. Justice, Jr., Vice-President, David W. Banks, Secretary-Treasurer, of the Company, and each of them be and are hereby authorized and empowered to transact any and all business the said Company may have with any Custom House in the United States of America; to make declarations to entries of merchandise imported by the said Company; to endorse bills of lading and to sign all bonds in the name of said Company as required by the law or the regulations of the Collector of Customs or Treasury Department; to secure the duties on importations made by said Company; and also in the name of said Company to execute and deliver any and all bonds of indemnity to the Collector of Customs for the production of endorsed bills of lading and that a copy of this resolution be sealed with the seal of said Company.

Further Resolved: That the proper officers of the Company are authorized to open bank accounts with the Corn Exchange National Bank, Philadelphia National Bank and Girard National Bank, in Philadelphia; and National City Bank in New York; First National Bank, in Cumberland, Maryland.

On motion duly made and seconded it was

Resolved: That the filing by the officers of the capital stock statement required by law with the State Tax Commissioner of Maryland be, and the same is, hereby approved, and

that the said statement as filed, with the certificate of record of the State Tax Commissioner, be spread on the minutes of this meeting as follows:

N. & G. Taylor Co., Incorporated

Capital Stock Statement.

The Undersigned Hereby Certify:

1. That the Board of Directors of the above named
276 corporation, on the 26th day of January, 1917, duly passed a resolution declaring that it is advisable to issue 1,750 shares of the common stock and 6,250 shares of the preferred stock of said corporation, for the following property, suitable for the purposes of the said corporation or for some of such purposes, and valued by the said Board of Directors at the sum of $800,000.00:

(a) The entire right, title and interest, property and assets of every kind and description, including good will and trademarks, of the firm of N. & G. Taylor Co., subject to all liabilities of said firm, which liabilities are to be assumed by N. & G. Taylor Co., incorporated;

(b) 3,000 shares of the stock of Maryland Sheet and Steel Company, a New Jersey corporation.

2. That the said Board of Directors, by the said resolution (there being no shares of stock outstanding and entitled to vote), duly authorized such issue of stock for said property.

In Witness Whereof, the President and the Treasurer of the said corporation have hereto set their names and official designations, and affixed the seal of said corporation this 28th day of January, 1917.

(Seal)

H. N. Taylor,
President.
D. W. Banks,
Treasurer.

State of Pennsylvania, } Set.
County of Philadelphia }

I hereby certify that before me, the subscriber, a Notary Public of the State of Pennsylvania, in and for the county aforesaid, personally appeared H. N. Taylor, the President, and D. W. Banks, the Treasurer, of N. & G. Taylor Co., Incorporated, and severally acknowledged the foregoing state-

ment to be their respective act, and made oath in due form of law that the matters and facts set forth in said statement are true to the best of their knowledge and belief.

In Witness Whereof, I have hereto set my hand and
277 affixed my official seal, this 30th day of January, 1917.

JOHN J. RUTHERFORD,
Notary Public.

My commission expires January 22, 1919.

278 Witness: Following the authorization of January 26 the agreement of January 31st was signed on behalf of the corporation. I signed as President of the company and as one of the partners.

Mr. Beebe: It is understood, I suppose, that I have here at this time, the original by-laws and minutes of N. & G. Taylor Company, Inc., and that the pages I have been referring to are the pages from the by-laws and that it will not be necessary to offer the by-laws or the book itself in evidence because it is the book of the original by-laws of the company. Is that right?

Mr. Young: Yes, we make no point of it.

Mr. Beebe: For the purpose of showing amounts I have tabulations from the orders that we have showing no prices but showing the date of the order, the amount of the order and gallons, the date it was put on the track and the date when received.

Witness (being shown papers): I have seen them before in the Court Room. They are the file of copies of orders placed by the N. & G. Taylor Company during period November 1, 1916 to June 30th, 1917, with concerns other than Anderson & Gustafson to supply the deficiency. To supply oil. I have prepared a tabulation. (Upon being shown a document): This is a tabulation of purchases made during the period to which I have just referred. It was made from the original records of the entire transaction. In each case taken from office files. By myself.

Mr. Young agreed they were a correct tabulation of the invoices and orders and that they could be totaled later.

The Court: They may be admitted, subject to the objection and exception as to the relevancy and competency of the evidence.

Philadelphia, Dec. 22, 1917

Date	Our Order No.	Gallons	Price	Seller	Diff. per gal.	Amount
11 /17 /16	11223	26349	6-1 /2c Cumb.	Union Petroleum Co., Phila /, Pa.		
"	11231	39543	"	"	1-1 /4c	$3035 78
4 /5 /17	11905	89402	"	Petroleum Products Co., Pittsburgh, Pa.		
6 /6 /17	12267	87569	"	"		
4 /16 /17	11957	15312	6-1 /2c Pittsburgh	Oil City Oil & Grease Co., Pittsburgh, Pa.	"	191 40
	Freight on Order #11957			"		144 51
"	11956	10151	6-61c Cumb.	Atlantic Refining Co., Phila., Pa.	1 36c	138 05
6 /9 /17	12295	99318	6 65c Cumb.	Sinclair Refining Co., Chicago, Ill.	1 40c	1390 45
6 /5 /17	12262	16157	6-3 /4c Cumb.	Oil City Oil & Grease Co., Pittsburgh, Pa.		
6 /26 /17	12376	24367	"	"		
6 /2 /17	12233	20105	"	"	1-1 /2c	4416 96
6 /8 /17	12282	233833	"	Petroleum Products Co., Pittsburgh, Pa.		
5 /29 /17	12234	58246	6 90c Cumb.	Oil City Oil & Grease Co., Pittsburgh, Pa.	1 65c	961 06
11 /17 /16	11222	6125	7c Cumb.	Sun Co., Phila., Pa.		
3 /27 /17	11861	38974	"	Union Petroleum Co., Phila., Pa.	1-3 /4c	789 23
6 /2 /17	12252	24703	7-1 /8c Cumb.	Kendall Refining Co., Bradford, Pa.		
5 /30 /17	12236	18223	"	Petroleum Products Co., Pittsburgh, Pa.	1 875c	804 86
4 /16 /17	11955	25604	7-1 /2c Marcus Hook, Pa.	Sun Co., Phila., Pa.	2-1 /4c	576 09
	Freight on Order #11955					258 55
1 /17 /17	11471	94613	7 61c Cumb.	Atlantic Refining Co., Phila., Pa.	2 36c	2232 87
1 /15 /17	11461	42226	8-1 /2c Cumb.	Sun Co., Phila., Pa.		
2 /19 /17	11661	53861	8-1 /2c	" "	3-1 /4c	4568 68
2 /22 /17	11685	44488	8-1 /2c Marcus Hook, Pa.	" "		
	Freight on Orders #11661 & 11685					999 23
1 /15 /17	11460	21054	9-1 /2c Cumb.	Union Petroleum Co., Phila., Pa.		
3 /6 /17	11748	24132	"	"	4-1 /4c	1920 40
2 /19 /17	11662	46242	9-3 /4c	"	4-1 /2c	2080 89
		1160697	Cumb.			$24509 01

280 J. J. SCHOCK, Called as witness for Plaintiff, was first duly sworn and upon Direct Examination by Mr. Beebe, testified as follows:

Witness: Name, J. J. Schock. In oil producing business and railroad business. In oil business since 1915. Live at Okmulgee, Oklahoma; have lived there since 1919 and at intervals prior to that time, my parents having moved there in 1902. Prior to 1912 lived in St. Louis part of time, and Tulsa part of time and in St. Louis part of time prior to that. Tulsa and Okmulgee are in the oil regions. From November 1916 to June 1917 was in oil refining business. Have been in that business since middle of 1915. From November 1 to June 30th, 1917, I was with the Indiahoma Refining Company. As Secretary and treasurer. Also director. Brother and I had charge of sales department and both buying and selling—bought on spot market and on contract. Was necessary for me to know regarding sales of other companies. Knew general and usual course of business at that time with reference to sales in that territory. Made sales myself at that time. Kept posted on market values of oil during that period. Know meaning of 30 to 32 Baume gravity test. Have an opinion based on his knowledge and experience in oil business as to what was fair market value of fuel oil 30 to 32 Baume, f. o. b. refinery, freight allowed to Cumberland, Maryland, any time between November 1, 1916 and June 30, 1917. Can give an opinion by months. On that basis November was 5½ to 5¾ cents per gallon, f. o. b. refinery; December 6¼ to 6½ cents; January 8¼ cents; February 8¾ cents; March back to approximately 8 to 8¼ cents; April about 7¼ cents; May same; June same; all f. o. b. refinery, freight allowed to Cumberland, Maryland.

281 *Cross-Examination by Mr. Young.*

Witness: Age 35. In 1916 was connected with Indiahoma Refining Company. Company now in business. In 1916 had two refineries, Okmulgee and East St. Louis, Illinois. Owned tank cars and leased some; deliveries of oil during that period were in cars we owned or controlled or cars furnished by people from whom we would buy on outside markets for delivery on contracts. Those would be seller's cars. Sellers were to furnish cars for oil purchased by Indiahoma Refining

Company. Used railroad equipment. From Frisco; some Katy cars. Some Santa Fe cars. Occasionally M. & G. cars and a few Midland Valley cars. Santa Fe, Frisco and M. K. & T. had largest tank car equipment. Furnished some cars to customers. Had experience in shipping oil east of Pittsburgh. During that period shipped east of Pittsburgh. In own cars and in cars furnished by people from whom we bought oil. Figures given in answer to Mr. Beebe's question as to market value of oil for various months from November 1916 to June 1917 were figures based on my knowledge of conditions at the time and sales we were making and purchases we made. Have not refreshed by recollection lately except to think it over and recall incidents and instances ruling at that particular time. Haven't looked at any price list. Had no price list. Looked at no published list of prices for that period. What I have testified to is independently recalled after thinking it over. Recall now that in November 1916 fair market value of 30 to 32 Baume fuel oil was 5½ cents a gallon f. o. b. refinery with freight allowed to Cumberland, Maryland. Allowed approximately 2¾ cents for freight to that place. Can not tell actual freight rate. Freight to Philadelphia was 3.21 per gallon. To Pittsburgh 2.10 per gallon; estimating between those figures, think it would be approximately 2¾ cents. Do not know as a matter of fact
282 that freight on four cars shipped from Oklahoma to Cumberland was 2.89. If shown an invoice introduced in evidence as an exhibit showing that freight rate, it would help me to determine what freight rate was. (Upon being shown Plaintiff's Exhibit 35 and having his attention called to invoice for car of oil shipped from Niotase, Kansas, Group 3); That takes the rate from which I am testifying. Rate would be 2.89 cents per gallon, part of the oil based on 4.6 per gallon and put 6.6 per gallon. In my estimate I figured 2.75. Price of oil, estimating freight rate was 2.89 cents, was 5.64 f. o. b. Cumberland, Maryland with freight allowed refinery. If deduct 2.89 that would give price of oil without freight, 2.61. 2.61 a gallon at the refinery in sellers' cars. For delivery to Cumberland, Maryland. In November 1916 could buy plenty of fuel oil f. o. b. tanks—not tank cars—f. o. b. tanks refinery at 50 to 75 cents per gallon. That would be something of a fraction over 1 cent to a fraction over 1¾ cents per gallon. 42 gallons in a barrel. Should say 1¼ to 1¾ cents per gallon in tanks. In Oklahoma or Kansas, Group 3. Taking 1¾ cents and 2.89 freight give 4.64. The 1.75 is

in the tank cars. Agree that Mr. Young was adding to the value of the oil in the tanks the freight, that giving the figure just quoted of 4.64 a gallon f. o. b. tanks in group 3, plus freight rate to cumberland, Maryland. My price is delivered in cars for shipment to Cumberland, Maryland; not in tanks but in tank cars. As soon as oil is pumped out of storage tanks and put in tank cars for shipment east, has a greater value at once without moving a foot on the rail; particularly for shipment east on account of limitation of tank car equipment and coming into the winter period in which tank cars move more slowly and the high rental value of tank cars, in that period of time. Yes, ordinarily, on the average it takes longer for a tank car to go from Oklahoma east and get back again than if it circulates in western territory. Yes, if 283 cars are to go a long distance, oil is worth more than loaded for short distances. Also we take into consideration if we could load the oil in trainload lots or keep the cars together. We could get better movement on 10-15 or 25 or 30 or 40 cars and train lots than we could on a single car movement on to the same point. In December, market value of this grade of oil in tanks in Group 3 had gone up. Price of crude had gone up at that time. Think that made an advance by the end of December of at least 25 cents per barrel. Said fuel oil naturally followed the advance for delivery at Cumberland, Maryland, f. o. b. refinery and in sellers' cars the oil was worth from 6.50 to 5.75 cents. Crude had gone up and the demand had also made an increase in the price of fuel oil. My estimate is 2.25 cents per gallon. The fact of the matter is, I think we bought fuel oil in December for $1.00 per barrel in tanks in group 3, which would be about 2½ cents per gallon. In January the price was still up. Crude was going up all the time from November until about April. There price finally got to 1.70 and hung there several months until fall of 1917. January exceeded December very much. In January about 3 or 3¼ cents per gallon. February highest month we had so far as my experience went for fuel oil for delivery east. Crude oil went up to about $1.40 in January and February and then on up to $1.70 a barrel. From 1.40 to 1.70 would be approximately 3/4 cents per gallon. Fair market value of this oil in Oklahoma and Kansas in February in tanks about 4 cents per gallon. March approximately the same. A little less perhaps than that in tanks, approximately 3¾ cents; in April, about the same. By March or April, crude had moved up to the highest; stayed until the

end of summer about $1.70 per barrel and fuel oil at that time in the spring of that year was selling about the same
284 as the price of crude, that is 30 to 32 Baume oil. Price of fuel was down as compared with March, in April down to about 3¾ cents, slightly under price of crude. No further reduction in May in tanks or refinery. About the same. June about the same. All refined oils are affected quite considerably by the fluctuation in the price of crude.

Mr. Young: Was there plenty of this oil down in Group 3?

Witness: Of 30 to 32? There never has been plenty. Plenty is a relative term. There never has been any large amount of 30 to 32. The average run of fuel oil in that district was 24-26 or 24-28 gravity. Very little 30 to 32 oil from that field. Sold for gas. What was made was made for gas oil and for tracking for consumption in a furnace. Don't recall now whether there was much more or not. Haven't any connection with sales now. Know Santa Fe Railroad eastern terminal is Chicago. When refiner owns or controls tank car, can send it anywhere he wants. Can do so when he has car under lease, where he has exclusive control of car. But if using railroad equipment is subject to rules of railroad.

285 *Redirect Examination by Mr. Beebe.*

Witness: M. K. & T., St. L. & S. F., A. T. & S. F., go into Oklahoma and Kansas, Group 3, K. C. & S., Midland Valley, M. O. & G., Mo. Pac. the Orient and Rock Island, those are the principal ones. All of those are railroads over which the rate to Cumberland, Maryland would apply from almost any point in Group 3.

Mr. Beebe: What do you mean by a tank? Describe it to the jury.

Witness: At these refineries, the refiners had to keep what are called storage tanks; that they are great big tanks; they handle from 500 barrels up to 55,000 barrels capacity; fuel oil kept usually in tanks ranging from 10,000 to 15,000 up to 55,000 barrel capacity. In other words, are just big storage tanks at refinery which are used for storing surplus oil from time to time. Sometimes in summer fuel oil accumulates and is moved off in winter and they have to have storage tanks of sufficient capacity, depending on capacity of refinery to take care of surplus not moved from time to time. Are just great big storage tanks of steel, sometimes with steel tops and sometimes with wooden tops or roofs. Expression Mr. Young

used "F. O. B. tanks and freight allowed to Cumberland, Maryland" means to my mind,—Refiner has some oil in tanks; I may have tank cars and buy the fuel oil in the tanks and buy it f. o. b. tanks. Then refiner would load it in any purchasers cars or in equipment furnished by me.

Mr. Beebe: Mr. Young, in making up his figures, left out one important element, did he not?

Witness: Yes. He left out value of tank cars on the trip. The rental value. I figured that in figures I gave on direct examination as fair cash market value of oil f. o. b. tank cars, freight allowed to Cumberland, Maryland. That was the usual and customary way among men engaged in oil business of arriving at fair market value of oil f. o. b. a given
286 point; in making quotation, they always take into consideration the point of delivery. And include tank car rental.

Recross Examination by Mr. Young.

Witness: Tank cars were getting scarcer in winter of 1917. Prices of tank cars were naturally going up. Being offered all the time at high prices, or bootleg prices as they called them at that time. Do not know that all of railroads mentioned have own equipment. Santa Fe of course always has had; Santa Fe has largest equipment at that time. Frisco and Katy had, would say off hand, about 700 cars each. Midland Valley had a few, M. O. & G. had a few. K. C. and S. had a few. Don't think Mo. Pac. had any cars. Those cars were cars railroads used in their own business for themselves and also furnished to customers. The lines of none of the railroads mentioned extend east of Chicago.

Redirect Examination by Mr. Beebe.

Witness: There were a good many companies other than railroads that owned tank cars at that time. We were offered tank cars at big prices. It was possible during that period of time for any man who desired to pay for them to get tank cars. Know concern known as General American. At that time it was the German-American Tank Car Company. Do not know how many tank cars they owned. Had a large number that they had previously sold and they manufactured and leased tank cars. They leased their tank cars.

Mr. Young: Object as immaterial.

The Court: Sustain the objection in that form.

Mr. Beebe: Exception. "Did you, during that period of time, from November 1, 1916 to June 30, 1917, receive any oil at any point from Anderson & Gustafson, delivered in tank cars?"

Mr. Young: Object immaterial.

The Court: Sustained.

Mr. Beebe: Exception. That is our case, if the Court please.

287 The foregoing was all the evidence introduced on the trial of this cause.

And thereupon the Defendants offered a motion to take the case from the jury, together with an instruction, and the Court granted the said motion and marked the said instruction "given;" which said motion and which said instruction are in words and figures as follows, to wit:

Now come the Defendants, by Alden, Latham and Young, their attorneys, at the close of Plaintiffs' case, and move the Court to exclude the evidence, and to give to the jury the following instruction. "The Court instructs the jury to find the issues in favor of the Defendants." Given.

To which action of the Court in granting the said motion and in giving the said instruction the Plaintiff, by its counsel, then and there duly excepted.

Thereupon the Court read the said instruction to the jury.

To which action of the Court in giving the said instruction to the jury Plaintiff, by its counsel, then and there duly excepted.

Thereupon the jury returned its verdict as follows:

We, the jury, find the issues in favor of the Defendants.

Whereupon Plaintiff, by its counsel, made its motion for a new trial.

But the court over-ruled the motion for a new trial; to which action of the court, in over-ruling motion for a new trial Plaintiff, by its counsel, then and there duly excepted.

288 Thereupon Plaintiff, by its counsel, made a motion in arrest of judgment.

But the Court overruled its motion in arrest of judgment; to which action of the Court in overruling the motion in arrest of judgment Plaintiff, by its counsel, then and there duly excepted.

Whereupon the Court entered judgment upon the verdict

of the jury; to which action of the Court in entering judgment upon the verdict of the jury Plaintiff, by its counsel, then and there duly excepted.

Whereupon the Judge allowed the Plaintiff thirty days within which to file cost bond in the sum of two hundred fifty dollars ($250.00) and thirty days within which to file its bill of exceptions.

And forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the Judge of this Court pursuant to the statute in such case made; which is done accordingly, this 21st day of February, A. D. 1925.

ADAM C. CLIFFE,
Judge.

O. K. Alden, Latham & Young, Attys. for defendants. 2/21/25

289 And on to-wit: the 4th day of March, A. D. 1925, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following to-wit:

290 United States of America
Northern District of Illinois } ss.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

N. & G. Taylor Company, Inc., a corporation,
vs.
John A. Anderson and C. G. Gustafson, doing business under the name of Anderson & Gustafson, co-partners.
} At Law. No. 32831

STIPULATION.

It is hereby stipulated and agreed by and between the parties to the above entitled cause by their respective attorneys that the original bill of exceptions filed by the plaintiff in the United States District Court may be transmitted to the

United States Circuit Court of Appeals and by that Court considered in connection with the writ of error instead of copy of said bill of exceptions; and

It is further understood and agreed that this stipulation or a copy thereof shall be transmitted to said United States Circuit Court of Appeals as a part of the writ of error papers.

GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Plaintiff.
ALDEN, LATHAM & YOUNG,
Attorneys for Defendant.

(Endorsed) Filed March 4, 1925 Charles M. Bates, Clerk.

291 (Endorsed) General No. Law No. 32831 In the District Court of N. S. Northern Dist Ill. E. D. Taylor v Anderson Stipulation Filed Mar 4 1925 at ___ o'clock ___ M. Clerk. Good, Childs, Bobb & Wescott Illinois Merchants Bank Bldg. Chicago Atty's for Plaintiff

70 And on to-wit: the 5th day of February, A. D. 1925, there was filed in the Clerk's office of said court a certain Petition, in words and figures following to-wit: Filed 192

71 United States of America
Northern District of Illinois } ss.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

N. & G. Taylor Company, Inc., a Corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson.
} At Law. No. 32831

PETITION FOR WRIT OF ERROR.

And now comes H. & G. Taylor Company, Inc., a corporation, plaintiff herein, by its attorneys, and says that on or about the 5th day of January, A. D. 1925, this court entered

judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of the plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the United States District Court for the Northern District of Illinois, Eastern Division, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said United States District Court.

GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Plaintiff.

(Endorsed) Filed Feb. 5, 1925 John H. R. Jamar, Clerk

71½ And on to-wit: the 5th day of February, 1925, there was filed in the clerk's office of said court a certain Assignment of Errors, in words and figures following to-wit:

72 United States of America
Northern District of Illinois } ss.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

N. & G. Taylor Company, Inc., a Corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson.
} At Law. No. 32831

ASSIGNMENT OF ERRORS.

Now comes appellant, by its attorneys, and respectfully shows to the Court that in the record, proceedings, findings, order and judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division,

entered in this cause, there are manifest and reversible errors, that is to say:

(1) The finding and judgment of the Court are contrary to law.

(2) The finding and judgment of the Court are contrary to the evidence.

(3) The finding and judgment of the Court are contrary to the weight of the evidence.

(4) The finding and judgment of the Court are not supported by the evidence.

(5) The District Court erred in holding that the plea of the Statute of Limitations was a defense under the evidence of the case.

73 (6) The District Court erred in giving the instruction to the jury to find the issues for the defendant.

(7) The District Court erred in not granting the motion for a new trial.

(8) The District Court erred in overruling the plaintiff's motion for a new trial.

(9) The District Court erred in not granting the motion in arrest of judgment.

(10) The District Court erred in overruling the motion in arrest of judgment.

(11) The District Court erred in sustaining demurrer to the second, third and fifth counts of the declaration.

(12) The District Court erred in holding that under the evidence, the amended declaration stated a new cause of action, and in holding that the period of limitations had run as to such cause of action and, as a result of such holding, in giving to the jury a peremptory instruction in favor of the defendants at the conclusion of the plaintiff's case.

(13) The Court erred in not holding that the corporation, N. & G. Taylor Company, was merely a continuation of the partnership, N. & G. Taylor Company, insofar as this case was concerned.

(14) The District Court excluded proper and competent evidence offered on behalf of the plaintiff.

(15) The District Court erred in sustaining objections by attorneys for defendants to proper and competent evidence offered on behalf of plaintiff.

(16) The District Court erred in entering judgment for the defendants against the plaintiff.

(17) It appeared in this case from the evidence that all of the assets and liabilities were transferred by the partner-

ship to the corporation and that all of such assets and
74 liabilities were assumed by the corporation; that the partners became the owners of the capital stock of the corporation, and that the employees and property of the corporation were the same as those of the partnership. Under these circumstances, the District Court erred in not permitting the case to go to the jury and in letting the jury determine whether or not there was any liability under the contract.

(18) The District Court erred in considering this case in the same manner as though there were a transfer of the assets and liabilities from the partnership to the corporation which was, in no way, connected, either directly or indirectly, with the partnership save by receiving its assets, whereas in this case there was merely a continuation of the partnership by the corporation insofar as all the assets and liabilities are concerned.

(19) And for other reasons.

Wherefore the plaintiff prays that the judgment of the District Court be reversed, and that the case be remanded to the District Court for new trial.

Good, Cullen, Bean & Wescott,
Attorneys for Plaintiff.

(Endorsed) Filed Feb. 5, 1925. John H. R. Jamar, Clerk.

75 And afterwards on, to wit, the 5th day of February, 1925, this matter coming on to be heard, the following order was entered by the Court:

76 United States of America } ss.
Northern District of Illinois }

In the District Court of the United States

For the Northern District of Illinois

Eastern Division.

Thursday, February 5, 1925.

Present: Honorable Adam C. Cliffe, District Judge.

N. & G. Taylor Company, Inc., a Corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson.
} At Law. No. 32831

This 5th day of February, 1925, came the plaintiff by its attorney and filed herein and presented to the court its petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also, that a transcript of the record and the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration hereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of Two Hundred Fifty Dollars ($250.00).

Adam C. Cliffe,
Judge.

77 And on to-wit: the 2nd day of February, A. D. 1925, come N. & G. Taylor Company, Inc. as principal and Independence Indemnity Company, A Corp., as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal in words and figures following, to-wit:

78 Know all Men by these Presents, That we, N. & G. Taylor Company, Inc., as principal, and Independence Indemnity Company, (a corporation organized under the Laws of the State of Pennsylvania), as surety, are held and firmly bound unto John A. Anderson and C. A. Gustafson in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said John A. Anderson and C. A. Gustafson, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 2nd day of February in the year of our Lord one thousand nine hundred and Twenty Five.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court, between N. & G. Taylor Company, Inc., plaintiff, John A. Anderson and C. A. Gustafson, defendant, a decree was rendered against the said N. & G. Taylor Company, Inc., and the said N. & G. Taylor, Inc., having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said John A. Anderson and C. A. Gustafson citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said N. & G. Taylor Company, Inc. shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good,

then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of—

EDWIN S. DIXON, JR. (Seal)

N. & G. TAYLOR COMPANY, INC., (Seal)

By H. N. T. AGLOE (Seal)

President

Attest:

G. N. CUSPIN (Seal)

Secretary

INDEPENDENCE INDEMNITY COMPANY

By GEO. W. GULDI

Attorney-in-fact. (Seal)

Approved by—

ADAM C. CLIFFE

Judge.

(Endorsed) Filed Feb. 2, 1925. John H. R. Jamar, Clerk.

(Endorsed) 32831 United States District Court Northern District of Illinois Eastern Division N & G Taylor Company, Inc. vs. John A. Anderson and C. A. Gustafson, Bond on Appeal. Filed Feb. 2 ,1925 John H. R. Jamar, Clerk.

392 United States of America, } ss:

The President of the United States To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between N. & G. Taylor Company, Inc., a Corporation, plaintiff, and John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners, defendants, a manifest error hath happened, to the great damage of the said N. & G. Taylor Company, Inc., a Corporation, plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command ye, if judgment be therein given, that then under your seal, di-

tinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Wm. Howard Taft, Chief Justice of the United States, the 5th day of February in the year of our Lord one thousand nine hundred and 25.

JOHN H R JAMAR
Clerk of the District Court of the United States for the Northern District of Illinois.

(Seal)

Allowed by
ADAM C. CLIFFE
Judge.

Northern District of Illinois, } ss:

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 4th day of March, A. D. 1925.

CHARLES M. BATES,
Clerk United States District Court, Northern District of Illinois.

(Endorsed) 32831 United States Circuit Court of Appeals Seventh Circuit Writ of Error. Filed Feb. 5, 1925. John H. R. Jamar, Clerk. Copy deposited for the defendant in error in the Clerk's Office, U. S. District Court, Northern District of Illinois.

79 And on to-wit: the 5th day of February, A. D. 1925, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following, to-wit:

80 United States of America
Northern District of Illinois

N. & G. Taylor Company, Inc., a Corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners.
At Law. No. 32831.

STIPULATION

It Is Hereby Stipulated and Agreed between the parties to the above entitled cause, by their respective attorneys, that the Plaintiff, N. & G. Taylor Company, Inc., shall have an additional ten days, that is, until the fourteenth day of February, A. D. 1925, within which to file its bill of exceptions; and that the court may enter an order accordingly.

GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Plaintiff
ALDEN, LATHAM & YOUNG
Attorneys for Defendant

(Endorsed) Filed Feb. 5, 1925. John H. R. Jamar, Clerk.

81 And on to-wit: the 14th day of February, A. D. 1925, there was filed in the Clerk's office of said court a certain Stipulation, in words and figures following to-wit:

14. 82 United States of America
Northern District of Illinois }

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

N. & G. Taylor Company, Inc., a corporation
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners.
} At Law. No. 32831.

STIPULATION.

It Is Hereby Stipulated and Agreed between the parties to the above entitled cause, by their respective attorneys, that the Plaintiff, N. & G. Taylor Company, Inc., shall have an additional ten days, that is, until the twenty fourth day of February, A. D. 1925, within while to file its Bill of Exceptions; and that the court may enter an order accordingly.

GOOD, CHILDS, BOSS & WESCOTT,
Attorneys for Plaintiff

ALDEN, LATHAM & YOUNG
Attorneys for Defendant

(Endorsed) Filed Feb. 14, 1925. John H. R. Jamar, Clerk.

293 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

N. & G. Taylor Company, Inc., a corporation,
vs.
John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners.

No. 32831
To the Clerk:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit under writ of error heretofore filed by said court and include in the said transcript the following pleading, proceedings and papers on file, to-wit:

Praecipe,
Declaration,
Summons,
Marshal's return,
Additional plea,
Replication,
Amended Declaration,
Demurrer,
Order of May 5, 1924, overruling demurrer to first and fifth counts,
Order of May 5 1924, sustaining demurrer to second, third and fourth counts,
Amended to amended declaration,
Order of May 14, 1924, that pleas filed to first and fifth counts stand to amended declaration,
Order of May 14, 1924, that defendants have leave to file further pleas as to Statute of Limitations,
Additional pleas,
Replication and amended first and fifth counts to amended declaration,
Verdict,
Judgment,
Bill of Exceptions,

Petition for writ of error,
Assignment of errors,
Order allowing writ of error,
Cost Bond,
Clerk's certificate to transcript of record,
Writ of error,
294 Clerk's return to writ of error.
Praecipe for transcript of record,
Citation, and
All orders of court in the above entitled cause.

Said transcript to be prepared as required by law and the rules of the United States in the Circuit Court of Appeals for the Seventh Judicial Circuit.

Respectfully,
GOOD, CHILDS, BOBB & WESCOTT,
Attorneys for Plaintiff.

(Endorsed) Filed Feb. 5, 1925. John H. R. Jamar, Clerk.

295 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled N. & G. Taylor Company, Inc. A Corporation, vs. John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners, At Law, No. 32831, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 3rd day of March, A. D. 1925.

CHARLES M. BATES
Clerk.

(Seal)

296 United States of America, } ss.

The President of the United States, To John A. Anderson, C. A. Gustafson, doing business under the name of Anderson & Gustafson, co-partners, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein N. & G. Taylor Co., Inc., a Corporation, is plaintiff in error, and you are defendant in error to show cause, if any there be, why the Judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Adam C. Cliffe Judge of the District Court of the United States, this fifth day of February, in the year of our Lord one thousand nine hundred and twenty-five.

ADAM C. CLIFFE
Judge.

We hereby, this 6th day of February, 1925, accept due personal service of this citation on behalf of John A. Anderson and C. A. Gustafson, co-partners, Defendants in Error.

ALDEN LATHAM & YOUNG
Attorneys for Defts. in Error.

(Endorsed) No. 32831 District Court of the United States, Northern District of Illinois, Eastern Division. N. & G. Taylor Co., Inc., a Corporation, Plaintiff in Error vs. John A. Anderson and C. A. Gustafson, doing business under the name of Anderson and Gustafson, co-partners, defts. in error. Citation. Filed Feb 5 1925 At ____ o'clock ____ M. John H. R. Jamar Clerk

UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

I, EDWARD M. HOLLOWAY, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 179, inclusive, contain a true copy of the printed record, printed under my supervision and filed May 21, 1925, upon which the following entitled cause was heard and determined: N. & G. TAYLOR COMPANY, INC., a corporation, v. JOHN A. ANDERSON and C. A. GUSTAFSON, etc. No. 3556, October Term, 1924, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit
(Seal) Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-third day of June A. D. 1926.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the seventh day of October, 1925, of the October Term in the year of our Lord one thousand nine hundred and twenty-four and of our Independence the one hundred and forty-ninth.

And afterwards, to wit: On the twenty-first day of April, 1925, there was filed in the office of the clerk of this court a certain appearance of counsel for defendants-in-error, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.
No. 3556. October Term, 1925.
N. and G. Taylor Co., Inc.,
vs.
John A. Anderson, *et al.*

The Clerk will enter our appearances as counsel for the defendants-in-error.

W. T. ALDEN
H. P. YOUNG
H. C. LUTKIN
C. R. LATHAM
CHARLES MARTIN
134 South LaSalle St.
Chicago, Ill.

(Endorsed) Filed Apr. 21, 1925. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-second day of May, 1925, there was filed in the office of the clerk of this court an appearance of counsel for plaintiff-in-error, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.
No. 3556. October Term, 1924.
N. & G. Taylor Co.
vs.
John A. Anderson, *et al.*

The Clerk will enter my appearance as counsel for the plaintiff-in-error.

HENRY S. DRINKER, JR.,
EDWIN A. LUCAS
Bullitt Bldg.
Philadelphia, Pa.
ROBERT W. CHILDS
WALTER E. BEEBE
#1601 Illinois Merchants
Bank Bldg. Chicago.

(Endorsed) Filed May 22, 1925. Edward M. Holloway, Clerk.

At the regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the sixth day of October, 1925, of the October Term in the year of our Lord one thousand nine hundred and twenty-five and of our Independence the one hundred and fiftieth.

And afterwards, to wit: On the fifth day of January, 1926, the following further proceedings were had and entered of record, to wit:

Tuesday, January 5, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

N. & G. Taylor Company, etc.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.
3536 vs.	
John A. Anderson, *et al*, etc.	

It is ordered by the court that this cause be, and same is hereby set down for hearing on Tuesday, January 19, 1926.

And afterwards, to wit: On the nineteenth day of January, 1926, the following further proceedings were had and entered of record, to wit:

Tuesday, January 19, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

N. & G. TAYLOR COMPANY 3556 *vs.* JOHN A. ANDERSON, *et al*, etc.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Henry S. Drinker, counsel for plaintiff-in-error, and by Mr. H. P. Young, counsel for defendant-in-error, and the court having heard the same takes this matter under advisement.

And afterwards, to wit: On the fourth day of June, 1926, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

No. 3556. October Term, 1925, April Session, 1926.

N. & G. TAYLOR COMPANY, INC., a Corporation, *Plaintiff-in-Error,* *vs.* JOHN A. ANDERSON and C. A. GUSTAFSON, Doing Business Under the Name of ANDERSON & GUSTAFSON, Co-Partners, *Defendants-in-Error.*	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 4, 1926.

Before ALSCHULER, EVANS and PAGE, *Circuit Judges.*

Opinion by PAGE, *Cir. J.*

N. & G. Taylor Company, a co-partnership, made with the defendants a non-negotiable written contract. After defendants had defaulted thereon, the co-partnership, on February 1, 1917, sold all of its assets, including its rights under the contract, to appellant, called plaintiff, and plaintiff brought suit thereon in the Northern District of Illinois. After the time had run under the applicable statute of limitations, plaintiff amended its declaration by setting out the written contract and making allegations under oath, so as to enable it to maintain its suit under Section 18 of the Illinois Practice Act (Chap. 110 Cahill's Ill. R. S. 1923), as assignee of the contract.

The sole question, raised by a plea of the statute of limitations, is, Did the amendment state a new cause of action?

It is urged that because of the broad powers of amendment given by Section 954 of the Revised Statutes, the practice in the Federal courts differs from that in the state courts. The

authority under the Illinois statutes to make amendments is broad enough to permit such amendments to be made either before or after the running of the statute of limitations, because in Illinois the statute is raised by affirmative plea. If not so raised, the amendment is as effective as though the statute had not run. The power to make the amendment is not here in question.

It is also urged, on the authority of certain language used in *N. Y. Cent. R. R. Co.* v. *Kinney*, 260 U. S. 340, 346, that the plea of the statute of limitations is less effective in the Federal courts than in State courts. There the recovery was under the Employers Liability Act of April 22, 1908, Chap. 149, 35 Stats. at L. 65. The pleadings are not set out, but the court said:

> "The original complaint set forth facts that would have given a good cause of action at common law, under the statutes of New York or the Act of Congress."

The amendment alleged:

> "That at the time of the collision the plaintiff and defendant were engaged in interstate commerce."

The statute did not require that fact to be stated, and if, without that amendment, a good cause of action was stated under the statute, then, as Section 1 of that statute gives the remedy only against common cariers engaged in interstate commerce it necessarily follows that the amendment did not state a new cause of action. The language of the opinion relied on was not, we think, material to the decision of the case.

Plaintiff most strongly relies upon *M. K. & T. Ry.* v. *Wulf*, 226 U. S. 570. In that case the mother, as sole beneficiary, sued the railway company under the Kansas statute to recover for the death of her son. Under that statute, she might lawfully sue in her individual capacity. Subsequently, she had herself appointed administratrix of her son's estate and in that capacity joined in the suit. The Supreme Court held that the action was under the Federal Employers Liability Act and not barred even though the first appearance of the administratrix as plaintiff was two years after the cause of action arose. The court said: "The change was in form rather than in substance," citing *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445. Concerning that case, the Supreme Court, in *U. S. Fidelity Co.* v. *Kenyon*, 204 U. S. 349, 356, said that the court's observation on that point was made "in the course of the discussion of the controlling questions in that case." The *Stewart Case* was bottomed on *Browne* v. *Strode*, 5 Cranch

303, *McNutt* v. *Bland*, 2 How. 9, *State of Maryland* v. *Baldwin*, 112 U. S. 490, and *Gaither* v. *Farmers & Mechanics Bank*, 1 Peters 37, 42. In those cases, neither the question of the statute of limitations nor the question as to whether there was a new cause of action was either present or considered. The question was as to who, for jurisdictional purposes in the Federal Court, on the ground of diversity of citizenship, should be considered the party plaintiff in interest in suits on bonds where the state or some public official is named as obligee, that is, whether it should be the obligee in the bond or the person for whose benefit the bond was given. The *McNutt Case* is typical of the class of cases there in question. By the laws of Mississippi, sheriffs were required to give bonds to the governor for the faithful performance of their duties. Suit was brought on such a bond in the Federal Court in Mississippi, in the name of the governor, for the benefit of citizens of New York, against a citizen of Mississippi, and the court held that, notwithstanding the fact that the governor and the defendant were residents of the state of Mississippi, the controversy was between citizens of New York, for whose benefit the suit was brought, and the Mississippi defendant, and that there was the required diversity of citizenship. The court said:

> "Where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive law compelled to use the name of a public officer who has not, or ever had any interest in, or control over it, the courts of the United States will not consider any others as parties to the suit, than the persons between whom the litigation before them exists."

In further elucidation of the question, the court said:

> "Executors and administrators are not in this position, they are the actors in suits brought by them; the personal property of the decedent is vested in them; the persons to whom they are accountable, for whose benefit they act, can bring no suit to assert their rights against third persons, be the cause of action what it may; nor can they interfere with the conducting of the suit to assert their rights to the property of the decedent, which do not vest in them. The personal representative is, therefore, the real party in interest before the court, 12 Pet. 171, and succeeds to all the rights of those they represent, by operation of law; and no other persons are capable, as

representatives of the personalty, of suing or being sued. They are contradistinguished, therefore, from assignees who claim by the act of the parties, and may sue in the federal court in cases where the decedent could not. 8 Wheat. 668; 4 Cranch, 308, S. P."

See also *Irvine* v. *Lowry*, 14 Peters 293, 297. Even in those cases, the suits were brought in the name of the obligee for the use of those interested.

Unless the *Wulf Case* is to the contrary, the Supreme Court, on the question of the Federal jurisdiction invoked because of diverse citizenship, seems always to have held that executors and administrators are the real parties in interest. See *Ingersoll* v. *Coram*, 211 U. S. 361, and cases there cited.

In the hearing of the *Wulf Case* in the Supreme Court, *Union Pac. Ry. Co.* v. *Wyler*, 158 U. S. 285, was relied on, but the court distinguished between the *Wulf Case* and the *Wyler Case* by pointing out that the *Wulf Case* was simply one where a person who was entitled to the whole of the recovery had brought a suit under a Kansas statute and by the amendment made no change except to join herself as administratrix, so as to bring the case under the Federal statute, where she could not sue as an individual, whereas in the *Wyler Case* plaintiff who had sued upon the common law charge that the defendant had negligently employed and retained in its employ a fellow servant of the plaintiff and that the injuries sued for arose from such negligence, by amendment, abandoned the common law charge and "rested the cause of action exclusively upon the negligence of Kline, as a fellow servant, for the reason that a right of action was given in such a case by the law of Kansas, where the accident occurred." Thus the court held that the amendment introduced a substantially new cause of action to which the bar of the statute of limitations applied. We are of opinion that the difference between the *Wyler Case* and the *Wulf Case* is one of the material differences between the *Wulf Case* and the case at bar.

In the case at bar, independent of the Illinois statute, no suit could be maintained in a court of law other than by the co-partnership. There was no suit ever commenced in its name, nor in its name for the use and benefit of another. The Supreme Court of Illinois, in construing Section 18 of the Illinois Practice Act, under which plaintiff is attempting to maintain its suit, held:

"A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the

> plaintiff unless it contains the allegations required by Section 18, showing the assignment of the chose in action, the actual ownership thereof by him, and setting forth how and when *he* acquired title. A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. *Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 id. 222." (*Gallagher* v. *Schmidt*, 313 Ill. 40, 44.)
>
> *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444.

From this holding, it necessarily follows that, as prior to the amendment, there was no attempt to bring the case within the provisions of Section 18, there was up to that time no statement whatever of a cause of action. A statement of a cause of action, under that section, was necessarily the statement of a new and different cause of action. The interpretation of the statute by the Supreme Court of the State should be final and binding upon this court. *Elmendorf* v. *Taylor*, 10 Wheat. 152, 158; *Memphis Street Ry.* v. *Moore*, 243 U. S. 299; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Chicago* v. *Obermayer Co.*, 268 Fed. 237. There was no law by which plaintiff could maintain the suit except under Section 18 of the Illinois Practice Act.

The judgment is affirmed.

Mr. Justice Butler, *Chief Justice*, concurring: My concurrence is based wholly upon the interpretation of the Supreme Court of Illinois of section 18, chapter 110 and of the statute of limitations of that state as applicable to causes of action brought under that section. A case involving the identical question here in issue was quite recently decided by the Illinois Supreme Court wherein that court said:

> "The allegations in regard to any assignment by the Allis-Chalmers Company to the plaintiff do not appear in the original declaration, and no attempt to comply with this section of the Practice act was made until the filing of the amended declaration on December 2, 1919, six years after the expiration of the period of limitation for bringing suits against the city for damages by reason of the vacation of the street. A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title. A

declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. (*Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 id. 222.) The plea of the Statute of Limitations therefore presented a complete bar to the plaintiff's action. The amendment to the declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, but was the statement of a different cause of action in favor of the plaintiff by whom the suit was originally begun, based upon a different and contradictory state of facts." *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, 297 Ill. 444. (Cited in *Gallagher* v. *Schmidt et al*, 313 Ill. 40.)

If this interpretation be here applied, I see no escape from affirmance, however otherwise my inclination would be without the Illinois interpretation. There is here no element of a subsequently stated cause of action accruing under federal statutes such as the Employers' Liability Act, as was present in some of the reported federal cases. In my judgment the applicable statutes of that state and their interpretation by its Supreme Court must here control. (See *Netherland Life Ins. Co. Ltd.* v. *Hall*, 84 Fed. 278, 7 C. C. A.)

EVANS, *Cir. J.*, dissenting: Plaintiff is a corporation, organized to succeed and to take over the business of a copartnership operating under the same name, and which copartnership had, in November, 1916, entered into a contract with the defendant for the purchase of 1,200,000 gallons of oil at 5.05 cents per gallon, delivery dates being therein fixed. When the corporation-copartnership agreement above referred to was made (January, 1917) defendant had breached its contract, and thereafter continued to breach its agreement.

This action was brought within two years, with numerous counts in the declaration, but in none of them was there an allegation that the contract had been assigned by the copartnership to plaintiff. Upon the trial, which occurred some five years after the action was begun, such an amendment was allowed, and to the amended counts of the declaration defendant pleaded the statute of limitations, which was sustained, and a judgment was entered dismissing the complaint.

This miscarriage of justice is justified on the ground that the Illinois Statute, which authorized suit to be brought by the real party in interest, the assignee, required such as-

signment to be alleged in the declaration. The section reads as follows:

> "SEC. 18. 'The assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title;' but in such suit there shall be allowed all just set-offs, discounts and defenses, not only against the plaintiff, but also against the assignor or assignors, before notice of such assignment shall be given to the defendant."

Whether such amended declaration set forth a new, a different, cause of action, so that in applying the statute of limitations, the date of the amendment rather than the date of the commencement of the action, governs, is the question before us.

Relying on the decision in *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444, the majority opinion holds that this court has no alternative but to affirm the decision of the district court.

Whether the assignment of the cause of action must be pleaded, is not the determinative question. For the purpose of the argument, the decision of *Allis-Chalmers Mfg. Co.* v. *Chicago, supra*, may be accepted as conclusive on the necessity of alleging the assignment.

Our question is, however, whether the amended declaration changes the cause of action from that stated or attempted to be stated before the amendment. Is such question a substantive question of law, or a matter of pleading and practice? I shall consider the question on both hypotheses.

Upon this question, the effect of amended pleadings, two decisions of the Supreme Court are most instructive.

In *N. Y. Cent. R. R.* v. *Kinney*, 260 U. S. 340, the court was dealing with the effect of an amendment which inserted allegations that the carrier, at the time of the accident, was engaged in interstate commerce. It said:

> "The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted and was not affected by the intervening lapse of time.' *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290, 293. 'The facts constituting the tort were the same, whichever law gave them that effect.' *Seaboard Air*

Line Ry. v. *Koennecke*, 239 U. S. 352, 354. See also *St. Louis, S. F. & T. Ry. Co.* v. *Smith*, 243 U. S. 630. Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."

The court held that no new cause of action was stated in the amended declaration so as to permit of the defense of the statute of limitations.

In *M. K. & T. Ry.* v. *Wulf*, 226 U. S. 570, the court went farther than is necessary for us to go in the case at bar. After holding that a complaint brought against a railroad for damages resulting in the death of an employe while engaged in interstate commerce stated no cause of action in favor of such plaintiff, leave was granted in the lower court to amend the complaint so as to substitute the widow of the deceased for the administrator of said deceased. The court, considering the effect of such an amendment, said:

"It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American Railroad Co.* v. *Birch*, 224 U. S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us; an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within Sec. 954, Rev. Stat.

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Sec. 6 of the Employers' Liability Act. The change was in form rather than in substance. *Stewart* v. *Baltimore & Ohio R. R. Co.* 168 U. S. 445. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit. *Texas & Pacific Ry. Co.* v. *Cox*,

145 U. S. 593, 603; *Atlantic & Pacific R. Co.* v. *Laird*, 164 U. S. 393, 395."

Applying the language of this decision to the present case, we find that the amendment in no way modified or enlarged the facts upon which the cause of action was based, but merely "indicated the capacity" in which plaintiff was to prosecute the action.

Before this amendment to the Illinois Statutes the holder of the contract sued in the name of the original party thereto, but for his own benefit. Under the amendment, he sued in his own name and for his own benefit.

The decision of the court in *Quaker City Cab Co.* v. *Fixter*, 4 Fed. (2d) 327, is equally instructive. Had the action there been brought in the Pennsylvania State court, the amendment would, under the decisions of the state court, have been held to state a new cause of action, so that the statute of limitations would have applied as of the date of the amendment. But the court, in harmony with other Federal court holdings, decided the question for itself and held otherwise.

If the statute is one dealing with a question of pleading and practice, the Conformity Statute (Sec. 914 R. S., Sec. 1537 U. S. Compiled Statutes) which requires adherence to state court holdings only "as near as may be" becomes important.

In other words, if it be conceded for the purpose of the argument, that the Conformity Statute applies to the question of what constitutes a new cause of action, still there is a limitation in the Conformity Statute upon the extent of its application.

Under this reservation ("as near as may be") Federal Courts are at liberty to depart from the rules of pleading and practice prevailing in the state court when in their judgment such rules would tend to defeat the ends of justice. *Indianapolis, etc., R. R. Co.* v. *Horst*, 93 U. S. 291; *Shepard* v. *Adams*, 168 U. S. 618; *Phelps* v. *Oaks*, 117 U. S. 236; *Mexican Central Ry. Co.* v. *Pinkney*, 149 U. S. 194; *Lange* v. *Union Pac. Ry. Co.*, 126 Fed. 338, 340; *Williamson* v. *Liverpool & London Globe Ins. Co.*, 141 Fed. 54; *Southern Oil Corp.* v. *Waggoner*, 276 Fed. 487, 490; *Salisbury* v. *Bennett*, 72 Fed. 743.

Why should this court adopt the holding of the Allis Chalmers case? It is doubtful if the holding would have been adopted by any other state in the Union. Practically all of the states, certainly ninety per cent. of them, have either adopted

the code or especially provided that actions shall be brought in the name of the real party in interest.

That the present decision leads to injustice can not be doubted. In view of such injustice, we should not follow the decision of a state court whose precedents are those of the Elizabethan era, but should depart therefrom in order to avoid a "defeat of justice." Such slavish devotion to the rules of the common law, so long abandoned in the land of its origin, should not be sanctioned in the Federal courts when it would not only be unjust to do so, but would lead to hopeless confusion.

There is another reason why the Conformity Act should not bind us in this case. This statute applies when Congress has not legislated upon the particular subject. Where Congress has legislated, the Conformity Statute is not applicable. This statute applies only in the absence of direct legislation upon the subject by Congress. *Keary* v. *Farmers' and Merchants' Bank*, 41 U. S. 89; *Franzen* v. *M. & St. P. Ry. Co.*, 278 Fed. 370; *Petty & Co.* v. *Dock Contractor Co.*, 283 Fed. 341; *Southern Oil Co.* v. *Waggoner*, 276 Fed. 487.

Section 954 R. S. (Sec. 1591 U. S. Compiled Statutes) deals with the subject of amendments. Among other things, it is provided:

> "And such court * * * may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, and by its rules prescribe."

While such statute deals merely with the authorization of amendments, it irresistibly follows that if the Federal statute governs as to the allowance of amendments, the *effect* of such amendment must likewise be governed by the Federal rather than the state law.

In other words, the decision of the Illinois court is controlling, at most, only in so far as we are required under the Conformity Act to accept it. If upon the subject there dealt with, namely, amendments, the Conformity statute is not applicable, the decision of the state court governing the effect of amendments is not controlling. The weight of such state court decision is the same as the decision of any state court for which we entertain great respect, but when it is contrary to the holdings and dicta of Federal courts, or contrary to the great weight of authority prevailing throughout the United States, it should be repudiated.

It seems to me that reason, as well as the precedents above mentioned, requires us to hold that no new cause of action was stated by the insertion of the amendment here under consideration. Pleadings are but means whereby the ends of justice may be advanced and made more certain. They are not weapons whereby experienced and learned counsel may defeat an opponent, to the prejudice of the litigants.

At no time was there the least confusion or misunderstanding as to the nature of this controversy. Plaintiff charged the defendant with having made a written contract for the sale of oil and also charged that it breached the contract to the damage of the plaintiff. The contract itself was set forth in one count of the declaration *haec verba*. Doubtless the oversight which occasioned the plaintiff's failure to connect it with the contract, except through the addendum clause, was occasioned by the fact that plaintiff bore the same name as the copartnership, and was in fact a mere continuation of the copartnership.

My associates have insisted that this is not a question of practice but rather a matter of local statute, the construction of which by the supreme court of Illinois is decisive. Approaching the question on this hypothesis, let us inquire into the extent to which such state decisions are controlling.

Decisions without end may be cited wherein various courts in individual cases have apparently accepted the construction placed upon state statutes by the state supreme court. In doing so, at various times, careless language has appeared, which taken literally, may have extended the rule beyond its legitimate limits. That the rule, however, has limitations, and these limitations are clearly marked, can not be doubted. It has been so announced by this court in a rather recent case, *Quarles* v. *City of Appleton*, 299 Fed. 508. Two of the judges now sitting helped to constitute the court in that case.

An extensive discussion of the rule may be found in *Swift* v. *Tyson*, 41 U. S. 1, 18. I quote therefrom,—

> "In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enact-

ments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

This decision has been severely criticized, particularly in the minority opinion in *Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349. It was upheld, however, and has subsequently been accepted without serious question.

In *B. & O. Railroad Co.* v. *Baugh*, 149 U. S. 368, the court refers to this decision, and notes that the statute thus construed has never been amended.

> "Notwithstanding the interpretation placed by this decision upon the 34th section of the Judiciary Act of 1789, congress has never amended that section, so it must be taken as clear that the construction thus placed

> is the true construction and acceptable to the legislative as well as to the judicial branch of the government."

In *Edward Hines Trustees* v. *Martin*, 268 U. S. 458, 463, this decision is again referred to approvingly, and also in *Pana* v. *Bowler*, 107 U. S. 529, we find another statement of the rule with its limitations:

> "Where the construction of a State Constitution or law has become settled by the decision of the State Courts, the Court of the United States will as a general rule accept it as evidence of what the local law is. * * * *But we are not bound to accept the inference drawn by the Supreme Court of Illinois* that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of bona fide holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be."

To like effect, *see Olcott* v. *The Supervisors*, 83 U. S. 678; *Burgess* v. *Seligman*, 107 U. S. 20. Numerous other cases are herewith collected. *Town of Venice* v. *Murdock*, 92 U. S. 494; *Presidio County* v. *Noel-Young Bond Co.*, 212 U. S. 58; *Clark* v. *Beever*, 139 U. S. 96; *Casserleigh* v. *Wood*, 119 Fed. 308; *City of Ottumwa* v. *City Water Supply Co.*, 119 Fed. 315; id., 120 Fed. 309; *Columbia Ave. Sav. Fund* v. *City of Dawson*, 130 Fed. 152; *City of Mankato* v. *Barber Asphalt Paving Co.*, 142 Fed. 329; *Phoenix Bridge Co.* v. *Castleberry*, 131 Fed. 175; *Independent School Dist.* v. *Rew*, 111 Fed. 1; *Gilbert* v. *American Surety Co.*, 121 Fed. 499; *Scott* v. *McNeal*, 154 U. S. 34; *Township of Pine Grove* v. *Talcott*, 86 U. S. 666. They are all of them in harmony with the Tyson case, and the case of *Pana* v. *Bowler*.

Applying the decision of *Pana* v. *Bowler* to the present case, it seems to the writer that the majority opinion is giving effect not only to the state court's construction of the statute, but to the inference which the state court makes from that construction, which inferences we are all agreed are illogical and unsound. In other words, it might well be held under this Illinois statute, that the pleader should set forth how

and when he acquired his rights under the contract. If he did not do so, the declaration would be bad. That situation would be identical with the one that confronted the supreme court in *American R. R. Co.* v. *Birch*, 224 U. S. 547, where it held that no cause of action was stated under the Congressional Act dealing with a carrier's liability to its employes.

However, the question of the *amendment* of such declaration and whether the *amended declaration sets forth a new cause of action*, is not involved in the construction of the statute. Applying *Pana v. Bowler*, *supra*, to this situation, we are not required to follow the state court decision because it expresses merely inferences which we are able to deduce for ourselves.

Rather is our case similar to *M. K. & T. Ry.* v. *Wulf*, *supra*, where it was held the declaration was insufficient as it was originally drawn, but was sufficient when amended, and the real question was the effect of the amendment. The amended declaration did not state a new cause of action, so it was held. The decision in *Kuhn* v. *Fairmount Coal Co.*, *supra*, is especially worthy of consideration in view of the facts in this case. This action was brought before the Allis-Chambers decision was announced by the Illinois Supreme Court.

I have not gone into the question of what constitutes a new cause of action, nor have my associates, because I have assumed that if the question was an open one, all would agree that the introduction of this amendment did not state a new, a different, cause of action. 17 R. C. L. 814, 815; *Boudrioux* v. *Tucson Gas*, 13 Ark. 361; 33 L. R. A. (n. s.), 196 and note; *Leatherman* v. *Times Co.*, 88 Ky. 291; 3 L. R. A. n. s., 324; 8 A. L. R. 1405, Note. At least, it would not constitute a new cause of action under the great weight of authority, and surely not in the Federal courts.

Undoubtedly, Sec. 914 R. S. was enacted to harmonize the holdings in state and Federal courts when dealing with the same subject. And there is a lack of harmony when the Federal courts of Illinois hold that a certain amendment to a pleading does not constitute a new cause of action and the state court decisions of Illinois hold that it does. The Federal court, to harmonize its decisions with the Illinois court, would, however, be getting out of harmony with the other Federal courts, and the Supreme Court of the United States. This Court of Appeals would be in the anomalous situation

where it would be compelled to hold that such an amended pleading would not state a new cause of action in Indiana and Wisconsin, but would in Illinois. Greater confusion could hardly be conceived. And worse than such confusion is a decision not only contrary to the weight of authority, but one for which the court must apologize.

It is hardly necessary to add that I think the judgment should be reversed.

And on the same day, to wit: On the fourth day of June, 1926, the following further proceedings were had and entered of record, to wit:

Friday, June 4, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

N. & G. Taylor Company, Inc., a Corporation, vs. John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, Co-partners.	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

3556

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause, be, and the same is hereby affirmed with costs.

And afterwards, to wit: On the seventeenth day of June, 1926, there was filed in the office of the clerk of this court a certain notice and motion, which said notice and motion are in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

N. & G. TAYLOR COMPANY, *Appellant*, vs. ANDERSON & GUSTAFSON, *Appellees*.	No. 3556

NOTICE.

To: Alden, Latham & Young,
1110-134 South LaSalle St.,
Chicago, Illinois.

You Are Hereby Notified that on Thursday, June 17, A. D. 1926, at the hour of 9.45 A. M., or as soon thereafter as counsel can be heard, the undersigned will appear before their Honors, Judges Alschuler and Page, in the chambers usually occupied by them in the Federal Building, Clark and Adams Streets, Chicago, Illinois, and present a Motion for an order staying the issuance of the mandate in the above entitled cause, which Motion is attached hereto and made a part hereof; at which time and place you may be present if you see fit.

WALTER E. BEEBE,
Attorney for Appellant.

Received a copy of the foregoing Notice, together with a copy of the Motion therein mentioned, this 16th day of June, A. D. 1926.

ALDEN, LATHAM & YOUNG,
Attorneys for Appellees.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

N. & G. TAYLOR COMPANY, Appellant, vs. ANDERSON & GUSTAFSON, *Appellees*.	No. 3556.

MOTION.

And Now Comes Appellant Herein, by Walter E. Beebe, one of its attorneys, and prays the court to enter an order staying the issuance of the mandate in the above-entitled cause until the first day of November, A. D. 1926, and in support thereof, presents the following reasons:

(1) This court on June 5, on the appeal in the above-entitled cause rendered its decision in favor of the appellees and against appellant, sustaining the action of the trial court.

(2) Appellant desires to pray for a writ of certiorari at the earliest possible moment in the Supreme Court of the United States. The Supreme Court adjourned in the early part of June, 1926, and will not convene again until its regular October term, hence no petition can be acted upon until such time.

(3) Appellant has today ordered its record from the clerk in the Circuit Court of Appeals, and will proceed to have its petition and record ready to file at such time as the Supreme Court of the United States convenes.

(4) The staying of the writ of mandate can harm nobody for the reason that the decision in the lower court was against appellant and the costs up to the present time have been paid by appellant.

N. & G. Taylor Co.
By: Walter E. Beebe.

(Endorsed) Filed Jun. 17, 1926. Edward M. Holloway, Clerk.

And on the same day, to wit: On the seventeenth day of June, 1926, the following further proceedings were had and entered of record, to wit:

Thursday, June 17, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.

N. & G. Taylor Company, Inc., *vs.* John A. Anderson, *et al.*	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

3556

On motion of counsel for plaintiff-in-error, it is now here ordered that the mandate in this cause be stayed until the further order of this court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 22 inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and motions, stipulations and orders relating to filing of same) in the case of N. & G. Taylor Company, Inc. vs. John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, copartners, No. 3556, October Term, 1925, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit
(Seal) Court of Appeals for the Seventh Circuit, at the City of Chicago, this Twenty-third day of June, A. D. 1926.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 23, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4158)

In the Supreme Court of the United States.

OCTOBER TERM, 1926.

N. & G. Taylor Co., Inc., Petitioner (Plaintiff below),

Against

John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, copartners, Respondents (Defendants below).

PETITION FOR WRIT OF *CERTIORARI* TO REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of N. & G. Taylor Company, Inc., respectfully shows unto this Court as follows:—

1. The Court which rendered the decision here in question consisted of Judges Page, Alschuler and Evans, all three of whom wrote separate opinions. The majority opinion is by Judge Page, with a concurring opinion by

Judge Alschuler. Judge Evans dissented; his dissenting opinion clearly and concisely states the principal reasons on which petitioners rely in contending both that the majority decision is erroneous and that the important question involved is one on which such confusion of thought and decision exists in the Federal courts as to call for an authoritative decision by this Court. The majority and dissenting opinions each rely on Federal decisions as sustaining their diametrically opposite conclusions.

2. The suit was brought in the Illinois District, by N. & G. Taylor Co., Inc., a Maryland corporation, against two citizens of Illinois, for breach of a written contract, made in November, 1916, to deliver to plaintiff 1,200,000 gallons of fuel oil over the following eight months.

3. Suit was begun in 1918, the declaration setting out the contract *in haec verba*. The trial was not held until 1924, more than six years after the cause of action accrued.

4. At the trial it developed that when the contract was made in November, 1916, N. & G. Taylor Company was a partnership, consisting of H. N. Taylor and W. W. Justice, Jr.; that on January 31, 1917, when defendants were in default under the contract but before its final breach, the partners had incorporated their business. The two partners had then organized the plaintiff corporation, to which they transferred all the assets of the partnership, including its rights under the contract, the corporation assuming all its liabilities. All the stock in the corporation was held by the two partners, the name remained the same with the addition of the word "Inc.," and the personnel of the organization continued unchanged. From the record it does not appear that defendants knew, until the trial, that plaintiff had ever been a partnership. From one of their letters in December, 1916, it would appear that they then believed it to be a corporation.

5. Section 18 of the Illinois Practice Act permits a suit by the assignee of a chose in action but requires that the declaration set out "how and when he acquired title."

Smith and Hurd Revised Statutes, Illinois, 1925, Chapter 110, Section 18, page 1954; quoted in full in Judge Evans' opinion.

6. The original declaration set out the written contract *in haec verba*, but did not contain an averment alleging the incorporation of the business and the assignment of the contract to the corporation. When at the trial the above facts came out, Judge Cliffe allowed an amendment inserting the above averments but then sustained a plea of the Statute of Limitations, which ruling was sustained by the majority of the Circuit Court of Appeals.

7. The basis for the majority decision is that the question involves the construction of a local statute on which the Federal courts are bound by the interpretation of the State court "however otherwise my inclination would be without the Illinois interpretation." (Judge Alschuler's opinion, Rec. p. 191.)

8. The Illinois Supreme Court has held that where a declaration lacks any averment whose absence would render it demurrable, the insertion of such averment, however technical and lacking in real information, results in the statement of a different cause of action. This rule has been followed by the Illinois courts in cases involving the insertion of averments to comply with Section 18 of the Practice Act alleging how and when an assignee acquired title to the chose in action sued on.

9. The Federal courts, on the other hand, recognize that there may be both a defective and a proper statement of the same cause of action, and that the insertion of an allegation which did not "set up any different state of facts as the ground of action" (*M. K. & T. R.* vs. *Wulf*, 226 U. S. 570, 576), does not state a new cause of action,

but "merely expanded or amplified what was alleged in support of the cause of action already asserted." (*N. Y. Cent. Ry.* vs. *Kinney*, 260 U. S. 340, 346.)

10. The position of petitioners is that the question involved is neither the construction by a State court of a State statute nor mere matter of State practice, pleadings or forms and modes of proceedings in civil cases. The Illinois decisions holding that the insertion of a necessary technical averment results in the statement of a different cause of action do not constitute a construction of Section 18 of the Illinois Act, but the pronouncement of a general rule of law of which the application under Section 18 is but an illustration. Nor do such decisions involve a question of State pleadings and practice within the meaning of Section 914 of the Revised Statutes. The pleadings as amended conform precisely to Illinois practice, the question being as to the effect of making them so conform, and as to the effect of amendments, which the Federal courts are permitted to allow liberally, under Rev. Stat., Section 954, quite independently of any State statute. Finally, even if the case did involve a question of State procedure, Section 914 does not require a slavish adherence by the Federal courts to every State practice decision where such would result in gross injustice and confusion, but permits the latitude involved in the requirement of conformity "as near as may be."

11. Pursuant to petitioner's obligation to present reasons why the present case is one which this Court should review on *certiorari*, petitioner respectfully suggests that, entirely apart from the manifest injustice which both the majority and minority recognize would otherwise result, the case involves broad principles essential to the administration of justice in the Federal Courts, the confusion as to which in the Federal Courts can be no more forcibly illustrated than by the decisions cited in the majority and minority opinions and by the fact that such eminent judges rely on Federal decisions,—some of them the same decisions,—as

supporting opposite conclusions. As said by Judge Evans at the conclusion of his dissenting opinion (Rec. p. 199):—

> "Undoubtedly, Sec. 914 R. S. was enacted to harmonize the holdings in state and Federal courts when dealing with the same subject. And there is a lack of harmony when the Federal courts of Illinois hold that a certain amendment to a pleading does not constitute a new cause of action and the state court decisions of Illinois hold that it does. The Federal court, to harmonize its decisions with the Illinois court, would, however, be getting out of harmony with the other Federal courts, and the Supreme Court of the United States. This Court of Appeals would be in the anomalous situation where it would be compelled to hold that such an amended pleading would not state a new cause of action in Indiana and Wisconsin, but would in Illinois. Greater confusion could hardly be conceived. And worse than such confusion is a decision not only contrary to the weight of authority, but one for which the court must apologize."

12. A certified copy of the transcript of record as prepared in connection with the writ of error in the Circuit Court of Appeals, together with the further proceedings had in said Court, is presented herewith.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in the said Circuit Court of Appeals in the said case entitled in that Court, N. & G. Taylor Company, Inc., a corporation, Plaintiff in Error *vs.* John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, copartners, Defendants in Error, Number 3556, October Term, 1925, April Session, 1926; and that

the said Decree of the Circuit Court of Appeals made and entered in said case on the Fourth day of June, 1926, may be reversed by this Honorable Court and that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem meet and just.

And your petitioner will every pray, etc.

N. & G. TAYLOR COMPANY, INC.,
By
H. N. TAYLOR,
President.

HENRY S. DRINKER, JR.,
Of Counsel for Petitioner.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

HOLLINSHEAD N. TAYLOR, being duly sworn according to law, deposes and says that he is the President of the Petitioner corporation; that he has read the foregoing Petition and has knowledge of this litigation, and that the matters herein set forth are true to the best of his knowledge, information and belief.

H. N. TAYLOR.

Sworn to and subscribed before me this 26th day of August, 1926.

RUTHERFORD S. BATES,
[SEAL] *Notary Public*
Com. Exp. Jan. 21, 1929

I hereby certify that the foregoing petition in my opinion is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

HENRY S. DRINKER, JR.,
Of Counsel for Petitioner.

ARGUMENT.

The presence of Judge Evans' admirable opinion and his review of the cases makes extended argument unnecessary on the present petition.

The Illinois decisions relied on by the majority were not based on a construction of Section 18 of the Illinois Practice Act, but involved the pronouncement of a fundamental principle of general law,—that the addition of any averment necessary to a complete technical cause of action results in a different cause of action from that alleged without such averment. The leading Illinois cases involving this principle were cases involving the necessity, in personal injury suits against municipalities, of an averment of written notice of the injury by the plaintiff to the city within a year after the accident. The Court held that the notice was essential to the right of action and must therefore be averred, and that where the original declaration failed to contain it, an amendment after the limitation period, alleging that the notice had in fact been given, subjected the declaration to the plea of the Statute of Limitations.

Walters vs. *City of Ottawa*, 240 Ill. 259;
Prouty vs. *City of Chicago*, 250 Ill. 222.

These decisions were followed by the Illinois Court in cases involving amendments to conform to Section 18 of the Practice Act.

They did not involve the construction of the Illinois Statute nor indeed the form and mode of State procedure, but the fundamental question of general law as to what constitutes a different cause of action.

The reasoning of the Illinois Court is that since the technical averment in question is essential to a statement of a legal cause of action, and since no statement of cause of action is valid without it, its addition must result in the statement of a different cause of action. Such reasoning, as Judge Evans points out, is worthy of the Elizabethan era, but happily, is rare in modern times.

particularly in the Federal Courts which, under Section 954, "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, or by its rules prescribe."

As said *In re Griggs*, 233 Fed. 243, 246, the very purpose of Section 954 was "to free the administration of justice in the Federal Court from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits."

The Federal power is further defined by the Act of February 26, 1919, 40 St. at L. 1181:—

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

When a plaintiff in the Federal Court has, from the institution of the suit, fully advised the defendant in the pleadings as to the particular transaction on which the claim is based, the Federal Courts do not permit defendant to defeat a just claim merely because of the original omission of some fact, which, while necessary to make the pleadings conform to State practice, was totally unnecessary to advise defendant adequately of the essential nature and basis of the claim.

The fundamentally different view taken by this Court as to what constitutes the allegation of a different cause of action in connection with a plea of the Statute of Limitations, and the distinction between this question and that of a matter of pleadings and forms of procedure is forcibly illustrated by the decisions in *American Railroad vs. Birch*, 224 U. S. 547, and *M. K. & T. Ry. vs. Wulf*, 226 U. S. 570.

In the first this Court held that an action under the Federal Employers Liability Act could not be maintained by the widow but only by the personal representative. In the second case the Court sustained the allowance of an amendment, after the limitation period, substituting the personal representative for the widow who had instituted the suit. The Court said that the amendment did not "set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit."

So also in *N. Y. Cent. R. R.* vs. *Kinney*, 260 U. S. 340, this Court, speaking through Mr. Justice Holmes, in dealing with the effect of an amendment inserting the essential averment that the carrier was engaged in interstate commerce, said:—

> "The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted * * * and was not affected by the intervening lapse of time.' *Seaboard Air Line Ry.* vs. *Renn*, 241 U. S. 290, 293. 'The facts constituting the tort were the same, whichever law gave them that effect.' *Seaboard Air Line Ry.* vs. *Kocnnecke*, 239 U. S. 352, 354. See also *St. Louis, S. F. & T. Ry. Co.* vs. *Smith*, 243 U. S. 630. Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."

In the case at bar, the defendants were notified in writing by the plaintiff corporation on March 20, 1917, that plaintiff intended to hold them legally responsible for the breach of the only contract which ever existed between the parties (Rec., pp. 58-9; see also letter of January 18th, Rec., p. 57).

In March, 1918, defendants were officially advised, by the suit instituted, of plaintiff's determination to hold them

liable, the declaration setting out the contract and the breach, in six counts, with every conceivable ramification.

There is no thought in this case, but that the defendants had notice of this very claim from the beginning. To permit the plea of the statute to avail defendants would be to return to the days of Lord Coke when "the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading."

Caldwell, *J.*, in *McDonald* vs. *State of Nebraska*, 101 Fed. 171, 182.

This is not a mere question of State pleading, practice or form and mode of procedure. The local requirement as to the form of the pleadings was completely satisfied and the pleadings as amended would stand the criticism of the most technical Illinois practitioner.

Finally, even if the question were one of following State procedure, the Federal Courts are not bound by Section 914 to adhere slavishly to every technicality engrafted by the State Courts into their forms of practice. The insertion by Congress into the Conformity Statute of the words "as near as may be" gave to the Federal Courts the power to reject, "as Congress expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

Van Doren vs. *Penna. R. Co.*, 93 Fed. 260, 269;
Railroad vs. *Horst*, 93 U. S. 291.

The history, purpose and effect of the liberalization of amendments in the Federal Courts are nowhere more clearly summarized than in *McDonald* vs. *Nebraska*, 101 Fed. 171, 176-182, which was cited with approval by this Court in *M. K. & T. Ry.* vs. *Wulf*, 226 U. S. p. 577, *supra*.

This was a suit by the State Treasurer of Nebraska in his official capacity, to which defendant demurred on the ground that suit should have been brought in the name of

the State. The trial Court having allowed an amendment after the period of the statute of limitations, substituting the name of the State as plaintiff, it was held that this was not error, the Court stating that the amendment made no change in the cause of action or in the real parties to the suit. In the course of the opinion Judge Caldwell said:—

> "But, independent of the Nebraska Code and the decisions of the supreme court of that state, we would have no difficulty in upholding the judgment of the lower court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the judiciary act of 1789. That act was framed by the great statesman and lawyers who had actively participated in the struggle to establish the political independence of their country. When this object had been achieved, and the constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the supreme court of the United States grasped the object and purpose of this enactment. In referring

to this section of the judiciary act, the supreme court of the United States, speaking by Mr. Justice Story, said:

" 'The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy.' *Matheson's Adm'rs.* vs. *Grant's Adm'rs.*, 2 How. 263, 281, 11 L. Ed. 261.

"And Mr. Justice Miller, speaking from the Circuit Bench, declared:

" 'This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the modern codes. It is founded on common sense and justice, and ought to be regarded by the circuit courts as mandatory.'

* * * * * * *

"A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. *But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of the wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff.* The name of the proper plaintiff may be brought on the record at any time during the progress of the

cause, and may even be inserted after verdict and judgment. *When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations.*"

* * * * * * *

At the close of the opinion the Court contrasts forcibly the practice of the law as it was in Lord Coke's day, and as it is in the Federal Courts today:—

"There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The Courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial and technical rules governing the statement of actions and defenses—for the entire system of special pleadings was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the cause determines its decision, and not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defend-

ant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and *what is meant by substantial right is a right going to the actual merits of the case.* Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of court, or to delay justice."

The other considerations which lead to the conclusion that the majority opinion is both erroneous and conducive to confusion and the defeat of justice in the Federal Courts are so clearly pointed out in Judge Evans' opinion as to require no further comment.

Respectfully submitted,

ROBERT W. CHILDS,
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For Petitioner

(16)

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CHARLES ELMORE CR

No. 114 OCTOBER TERM, 1927.

IN THE

Supreme Court of the United States

N. & G. TAYLOR CO., INC., Plaintiff in Error,

vs.

JOHN A. ANDERSON and C. A. GUSTAFSON, doing business under the name of ANDERSON & GUSTAFSON, Copartners, Defendants in Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT W. CHILDS,
WALTER E. BEEBE,
HENRY S. DRINKER, Jr.,
EDWIN A. LUCAS,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

No. 605. OCTOBER TERM, 1926.

N. & G. Taylor Co., Inc., Plaintiff in Error,

vs.

John A. Anderson and C. A. Gustafson, Doing Business under the name of Anderson & Gustafson, Copartners, Defendants in Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

REFERENCE TO OFFICIAL REPORT OF OPINIONS DELIVERED BY THE COURT BELOW.

The majority opinion by Judge Page is reported in 14 Fed. (2nd) 353.

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Judge Evans' dissenting opinion in 14 Fed. (2nd) 355.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(1) The judgment herein reviewed was entered January 6, 1925 (Rec. 41), and, upon review, was affirmed June 4, 1926, by the majority of the Circuit Court of Appeals (Rec. 186), Judge Evans dissenting (Rec. 191).

(2) This suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, was by a citizen of Maryland against a citizen of Illinois involving more than three thousand dollars.

The trial Court directed a verdict for defendants (Rec. 165) on the ground that the amendment allowed by said Court at the trial resulted in the statement of a new cause of action which was barred by the statute of limitations.

(3) The jurisdiction of this Court is invoked under Section 1217 of the Judicial Code, pursuant to which this Court, on petition of plaintiffs below, on November 23, 1926, granted certiorari to review the decision of the Circuit Court of Appeals (47 Sup. Ct. Rep. 237).

STATEMENT OF THE CASE.

In the Fall of 1916, N. & G. Taylor Company, then a partnership composed of Hollinshead N. Taylor and William W. Justice, was engaged in the manu-

facture of tin plate, with their principal office in Philadelphia, and their plant at Cumberland, Maryland (Rec. 107).

In November, 1916, the partnership, N. & G. Taylor Company, entered into a contract to buy from defendants their eight months' requirements of fuel oil, estimated at 1,200,000 gallons, at 5¼¢ per gallon, deliverable at plaintiffs' Maryland plant in fairly equal monthly quantities (Rec. 47).

No sooner was the contract made than a phenomenal rise began, both in the market price of oil, and in the rental price payable for tank cars to haul the oil from the refineries to plaintiffs' plant (Rec. 160, 143; 162-4).

Defendants at the outset fell behind in their deliveries, and by March 20th had delivered but 40,000 gallons—less than 6% of the quota to that date. This defendants contended was due to car shortage, while plaintiffs contended that it was due to defendants' desire to get the higher price available by delivery to other parties at the current market price, and to avoid the payment of the current premiums charged for tank cars.

The trial Judge having directed a verdict for defendants, for the purposes of the present writ of error defendants' breach of the contract must be regarded as wholly unjustified, and as attributable to their desire to reap the large profits available by the sale of plaintiffs' oil to others at enhanced prices, for delivery at nearby points, for which tank cars were more readily available.

Although defendants fell behind in their deliveries from the beginning, the actual legal breach of contract by them did not occur until March, 1917. Between November, 1916, and March, 1917, defendants from time to time shipped small quantities of oil under the contract and by their letters to plaintiffs kept holding out hope of a better performance in the future. Plaintiffs continually urged more prompt deliveries, until on March 20th, when, their patience exhausted, they wrote defendants (p. 59) that in view of defendants' failure to perform their contract, plaintiffs would buy oil elsewhere, and hold defendants for the difference in price.

Meanwhile, as of January 31, 1917, the two partners incorporated their business by securing a Maryland charter, Messrs. Taylor and Justice acquiring every share of the stock of the corporation, which took over all the partnership assets and assumed all its obligations (Rec. 138, 150-8).

No change whatever occurred in the business or in the personnel of those in charge of it (Rec. 150).

The name of N. & G. Taylor Company, under which the business had been carried on for more than 100 years, was not changed, the word "Incorporated" being merely added to it (Rec. 107).

There is nothing in the record from which it could be inferred that defendants knew, prior to the breach of contract by them in March, 1917, whether plaintiffs were a partnership or a corporation.

After February 1, 1917, and until the final breach

on March 20th, the parties continued their correspondence, plaintiffs writing on the letter heads of the corporation and instead of signing as formerly "N. & G. Taylor Company," the *letters now being signed*

"N. & G. TAYLOR CO.,
"H. N. Taylor,
"President."

The record shows at least three letters, dated February 15, February 23 and March 1, 1917, so signed (Rec. 147-149). The third of these letters so signed was specifically acknowledged by defendants in their letter of March 5, 1917 (Rec. 146).

These letters all refer to the oil shipments being made and in prospect under the existing contract between the parties.

Suit was brought March 7, 1918, by "N. & G. Taylor Company, Inc.," against defendants, for breach of this contract, the original declaration setting out, *in haec verba*, the written contract, dated November 1, 1916, between "N. & G. Taylor Company," and Anderson & Gustafson (Rec. 7-9). The original declaration having alleged that plaintiff was a Pennsylvania corporation, it was amended May 6, 1924, without objection, by changing the word "Pennsylvania" to "Maryland."

Owing to a congested docket and to a postponement requested by defendants, the trial was not held until May 12, 1924, more than six years after the cause of action accrued. It then developed from the testimony that the contract was originally made with

the partnership and assumed, prior to its final breach, by the corporation.

Section 18 of the Illinois Practice Act (hereafter quoted) permits the assignee of a chose in action to sue in his own name, but requires him to allege in his declaration that he is the actual bona fide owner thereof, and to set forth how and when he acquired title.

In order to comply with this provision and to avoid a variance, plaintiffs at the trial asked leave to amend their declaration by declaring on the identical contract as made by the partnership and assumed by the corporation.

Such amendment was actually allowed by the trial Judge over defendants' objection (Rec. 40).

The Court then directed a verdict for defendants on the latter's pleas of the Statute of Limitations (Rec. 165).

The judgment of the lower Court was affirmed June 4, 1926, by the Circuit Court of Appeals for the Seventh Circuit. Judge Page wrote the majority opinion, Judge Alschuler a concurring opinion.

Judge Evans filed a dissenting opinion.

Thereafter this Court allowed a writ of certiorari (Rec. 206).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

Plaintiff in error contends that the fundamental error of the trial Court, affirmed by the majority of

the Circuit Court of Appeals, consisted in the conclusion that the amendment stating when and how the plaintiff corporation acquired title to the cause of action sued on, resulted in the statement of a new or different cause of action after the expiration of the period of limitation.

ARGUMENT.

Summary.

The Illinois Practice Act permits the assignee of a chose in action to sue in his own name, but requires him to aver in his declaration how and when he acquired title.

An amendment to a declaration alleging that the plaintiff corporation succeeded to the rights of a partnership, after the execution of the written contract sued on, but before its final breach by defendants, does not state a new or different cause of action, but merely amplifies and expands the original averments.

The original declaration having set out, *in haec verba*, the written contract sued on, and the name, organization and personnel of the partnership remaining substantially identical after its incorporation by the two partners, who became the sole stockholders, the effect of the amendment was merely to make the pleadings comply with local practice, and

when allowed the amendment related back to the filing of the original declaration.

The Federal Courts are not bound slavishly to follow State decisions relative to the allowance, scope and effect of amendments to pleadings, this being specifically covered by Section 954 of the Revised Statutes.

The Conformity Statute does not require the Federal Courts to follow, against their better judgment, decisions of the Illinois Court to the effect that the insertion of any averment necessary to render a pleading non-demurrable results in a new cause of action. Such decisions involve but an inference from the State Practice Statutes, by which the Federal Courts are not bound.

In the Federal Courts, the test as to whether an amendment states a new cause of action is whether it sets up a different state of facts as the ground of liability. Hence, an amendment merely specifying the capacity in which the plaintiff sues, or expanding and amplifying the original averments, does not result in the statement of a new cause of action.

When in a suit in the Federal Court a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against him because of specified conduct, an amendment, necessary to make the pleading conform to State Practice, although unnecessary to advise defendant adequately of the essential nature and basis of the claim, may be allowed after the Limitation period.

Plaintiffs have fully Complied with the Requirements of Illinois Practice.

Section 18 of the Illinois Practice Act (Ill. Laws 1907, 443; Smith-Hurd Ill. Rev. St. 1925 c 110, Section 18, p. 1954) provides as follows:—

> "18. Suit on chose in action. Suit by subrogee. The assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; * * *."

By the amendment allowed by the Trial Court, plaintiff has fully complied with the requirements of this provision.

Admittedly plaintiff's declaration, as amended, fully satisfied the requirements of the local practice, as construed by the Illinois Courts. The most technical Illinois practitioner could now find no fault with it.

The Illinois decisions which the majority of the Court below felt bound to follow, "however otherwise my inclination would be without the Illinois interpretation" (Judge Alschuler's opinion, R. 191) did not involve the construction of this Section 18 of the Illinois Practice Act, which is too clear for construction. These decisions did not, by construing a State statute, prescribe the form or mode of State procedure, but dealt with the question as to what con-

stitutes a different cause of action,—a matter of general fundamental law,—and with the effect of amendments,—a matter regulated by the Federal Statutes.

Prior to any question of the kind involving Section 18, the Illinois Supreme Court had held, in several cases, that where a declaration lacks any averment the absence of which would render it demurrable, the insertion of such averment, however technical and lacking in real information, results in the statement of a *different* cause of action.

These decisions were not based on Section 18 of the Illinois Practice Act. They were cases involving the necessity, in personal injury suits against municipalities, of an averment of written notice of the injury by the plaintiff to the city within a year after the accident. The Court held that the notice was essential to the right of action and must therefore be averred, and that where the original declaration failed to contain it, an amendment after the limitation period, alleging that the notice had in fact been given, subjected the declaration to the plea of the Statute of Limitations.

Walters *vs.* City of Ottawa, 240 Ill. 259;
Prouty *vs.* City of Chicago, 250 Ill. 222.

Having so held, it followed that where an original declaration lacked the averment required by Section 18 of the Practice Act, the addition of such averment by amendment resulted in a new cause of action.

Allis-Chalmers Co. *vs.* Chicago, 297 Ill. 444.

This latter decision did not involve the construction of Section 18 of the Practice Act. It merely applied to a case involving an assigned chose in action the general principle of law pronounced in the earlier cases,—that the addition of any averment necessary to a complete technical cause of action results in a different cause of action from that alleged without such averment.

At best it was, as Judge Evans clearly shows in his dissenting opinion, but an *inference* from the procedure statute, which inference the Federal Courts are not bound to follow against their better judgment, in view of the specific Federal Statutes prescribing liberality in the allowance of amendments and the decisions of this Court defining the effect of amendments of this nature.

The question in the case at bar is not one relative to the form of the pleadings, which in every respect conform to the pattern prescribed by Section 18, but as to the effect of an amendment, which is governed, not by State decisions, but by Section 954 of the Revised Statutes, as construed by this Court.

The reasoning of the Illinois Court is that since the technical averment in question is essential to a statement of a legal cause of action, and since no statement of cause of action is valid without it, its addition must result in the statement of a *different* cause of action. Such reasoning, as Judge Evans points out, is worthy of the Elizabethan era, but happily, is rare in modern times, particularly in the

Federal Courts, which, under Section 954, "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, or by its rules, prescribe."

As said *In re Griggs*, 233 Fed. 243, 246, the very purpose of Section 954 was "to free the administration of justice in the Federal Court from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts *upon their very merits.*"

The Federal power is further defined by the Act of Congress February 26, 1919, c. 48, 40 St. at L. 1181:—

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

FEDERAL COURTS ARE NOT BOUND BY STATE DECISIONS RELATIVE TO THE ALLOWANCE AND EFFECT OF AMENDMENTS.

While the Illinois Courts thus apparently hold that the insertion of any essential averment results in a "new cause of action," the Federal courts, on the other hand, recognize that there may be both a defective and a proper statement of the *same* cause of action, and that the insertion of an allegation

which did not "set up any different state of facts as the ground of action" (M. K. & T. R. *vs.* Wulf, 226 U. S. 570, 576), does not state a *new* cause of action, but "merely expanded or amplified what was alleged in support of the cause of action *already asserted*" (N. Y. Cent. Ry. *vs.* Kinney, 260 U. S. 340, 346).

The power of the Courts of the United States to allow amendments, and the liberal practice adopted by them in exercising this power, do not depend on State Statutes or on State Practice, but are based on the paramount authority derived from the Federal Statutes:—

> "The right of the federal court to allow amendments under Section 954 of the Revised Statutes of the United States is well settled. The right exists quite independently of any state statute and may be exercised at any stage of the cause, even after submission, and extends to the verdict and judgment * * *."
>
> Bowden *vs.* Burnham, 59 Fed. 752, 754 (C. C. A. 8th Cir.);
>
> Mexican Cent. Ry. *vs.* Duthie, 189 U. S. 76;
>
> Illinois Surety Co. *vs.* Peeler, 240 U. S. 214, 222;
>
> Norton *vs.* Larney, 45 Sup. Ct. 145, 147.

Amendments, when allowed, relate back to the date of the filing of the pleading which they amend.

> Missouri K. & T. R. Co. *vs.* Wulf, 226 U. S. 570, 576;
>
> Underwood Co. *vs.* Davies, 287 Fed. 776, 779 (C. C. A. 5th Cir.).

Chapter 20 of the Judiciary Act of 1789 (later Section 954 of the Revised Statutes) provides as follows (Act of Cong. Sept. 24, 1789, C. 20, §32, 1 Stat. 91; Vol. 3 U. S. Compiled Statutes Annotated, Section 1591, p. 3180):—

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

THE PRESENT CAUSE OF ACTION ACCRUED DIRECT TO THE PLAINTIFF CORPORATION.

This is not a case (like the Illinois decisions relied on by the other side in the Court below) where one party to a contract, after a breach by the other, has assigned his completed cause of action to a distinct third party.

In the case at bar, the corporation stepped into the shoes of the partnership *while the contract was being performed* and before the breach was complete. The testimony in the present record was ample to justify the jury in finding that, after the formation of the corporation, it took the place of partnership in connection with the performance of the contract with defendants, and that, before the breach, contractual relations existed directly between the corporation and defendants.

The correspondence leading up to the breach was carried on between defendants and the corporation and the final breach, when it occurred in March, was with the corporation.

While defendants fell behind in their agreed deliveries prior to the reorganization, this delay was apparently acquiesced in by plaintiffs until March 20, 1917, when, plaintiffs refused further to condone defendants' scanty deliveries and wrote defendants (R. 59) that in view of defendants' failure to keep up the agreed schedule of deliveries, plaintiffs would buy this oil elsewhere and hold defendants for the difference in price. It was not until March 20, 1917, therefore, that this present cause of action accrued, and *it then accrued to the corporation*, which had taken over the business of the partnership almost two months before.

The letters from plaintiff in February and March, prior to the breach, but after the incorporation,

acknowledged by defendants, written on the letter-heads of the corporation, were signed

N. & G. TAYLOR CO.,
H. N. TAYLOR,
President.[1]

In the case at bar, there was no assignment to a distinct third party. The two partners merely changed the form of their organization. Even this change was complete before the final breach by defendants, which breach was with the plaintiff corporation.

In such a case, an amendment merely setting out the history of the transaction did not in any way change the cause of action sued on, much less introduce a *new* cause of action, but merely, in order to comply with the State Practice and to prevent a

[1] It is to be noted that even in December, 1916, before the incorporation was complete, defendants evidently did not regard plaintiff as a partnership, since in their letter of December 18th (Rec. 120), addressed to plaintiff, they say:—

> "Replying to your letter of the 14th inst., will say that we have now located the *contract with your company* which had been misplaced."

If defendants had thought plaintiff a partnership consisting of but two partners, they would naturally have said "the contract with your firm."

In this connection, reference is also made to defendants' plea to the original declaration, which alleged the contract as having been made by the corporation. To this defendants in their plea say (Rec. p. 26) "and the defendants further allege that shortly *after the making of the alleged contract* mentioned in the first and fifth counts" etc.

Here, while not admitting that the transaction in question was a contract, defendants distinctly admit that the transaction took place between them *and the corporation*.

variance between the pleadings and the proof, amplified the averments in the cause of action instituted long before the statutory period expired.

If the declaration, which set out in full the contract sued on, had alleged that it had been made on plaintiff's behalf by its President, this allegation would not be supported by proof that the Secretary had been the officer who acted for it, and an amendment would be necessary to prevent a variance, but such an amendment would obviously not introduce a new cause of action, the suit still being on the same contract, and would, of course, be allowed after the Limitation period. As in the case at bar, it would merely describe more accurately how the cause of action originally sued on arose.

It is such amendments which the Federal Courts are most liberal in allowing.

When a defendant in the Federal Court has, from the institution of the suit, been fully advised by the pleadings *as to the particular transaction on which the claim is based,* the Federal Courts do not permit him to defeat a just claim merely because of the original omission of some fact, which, while necessary to a complete technical cause of action[1] or required to make the pleadings conform to State

[1] For example, an absolute essential to a cause of action in the Federal Courts, no Federal question being involved, is the requisite diversity of citizenship, yet such an averment may be inserted by amendment after the statutory period.

Bison Bank *vs.* Billington, 228 Fed. 116;
B. & O. R. R. Co. *vs.* McLaughlin, 73 Fed. 519;
Carnegie *vs.* Hurlburt, 70 Fed. 209;
Bowden *vs.* Burnham, 59 Fed. 752.

practice, was totally unnecessary to advise defendant adequately of the essential nature and basis of the claim.

As administered by the Federal Courts in the year 1925, the practice of the law is no longer a game between opposing lawyers, but an instrument designed to do substantial justice between the parties.

THE TEST IN THE FEDERAL COURTS AS TO WHEN AN AMENDMENT INTRODUCES A NEW CAUSE OF ACTION.

The fundamentally different view taken by this Court as to what constitutes the allegation of a different cause of action in connection with a plea of the Statute of Limitations, and the distinction between this question and that of a matter of pleadings and forms of procedure is forcibly illustrated by contrasting the decisions in *American Railroad* vs. *Birch*, 224 U. S. 547, and in *M. K. & T. Ry.* vs. *Wulf*, 226 U. S. 570.

In the first, this Court held that an action under the Federal Employers' Liability Act could not be maintained by the widow, but only by the personal representative. In the second case, the Court sustained the allowance of an amendment, after the limitation period, substituting the personal representative for the widow who had instituted the suit.

This latter case (Ry. vs. Wulf) was an action originally brought by the plaintiff individually under the laws of Kansas for the death of her son, through defendant's negligence while in its employ. Subsequently, after the running of the two years limitation

period prescribed by the Employers' Liability Act, plaintiff was allowed to amend so as to sue under the Federal Statute, and as the personal representative of the deceased. This Court held that in spite of the fact that the amendment for the first time set up the Federal Statute as a basis for her recovery, and for the first time based her claim as administratix instead of in her own right as mother of the deceased, nevertheless the amendment did not state a new or different cause of action, since the original declaration had set out all the basic facts on which plaintiff relied for her recovery.

In the course of the opinion Justice Pitney said (p. 575):—

> "The argument for reversal rests wholly on the mode of procedure followed in the Circuit Court. It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action, and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

"It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

"It is true that under the Federal Statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in American Railroad Co. vs. Birch, 224 U. S. 547. But in that case

there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us; an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within Section 954, Rev. Stat.

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the Employers' Liability Act. The change was in form rather than in substance. Stewart *vs.* Baltimore & Ohio Railroad Co., 168 U. S. 445. *It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit.*"

Illinois Surety Company *vs.* Peeler, 240 U. S. 214, 222, was a suit on a contractor's bond. The original complaint failed to allege the completion and final settlement of the contract between the contractor and the United States, which, under the statute, was a pre-requisite to recovery. This Court approved the allowance, after the limitation period, of an amendment inserting such an allegation, citing Section 954 and Missouri K. & T. Ry. *vs.* Wulf, 226 U. S. 570.

Clearly such an allegation was as essential to the

statement of a valid cause of action as was the allegation of a compliance with Section 18 of the Illinois Practice Act in the Illinois cases relied on by defendants in error, and clearly also, if the Peeler case had been in the Illinois State Courts, it would have been decided the other way.

Similarly, in Friederichsen *vs.* Renard, 247 U. S. 207, this Court, in discussing a transfer, by amendment filed after the Statute of Limitations, of a suit in equity for annulment of a contract, to one at law for damages, said that to refuse this right would be *"to subordinate substance to form of procedure; * * * the allegations of fact are precisely the same in substance, and almost the same in form, as they were in the original bill and therefore looking to substance and realities, they cannot be regarded as stating a new cause of action."* (p. 213.)

So also in *N. Y. Cent. R. R.* vs. *Kinney*, 260 U. S. 340, this Court, speaking through Mr. Justice Holmes, in dealing with the effect of an amendment inserting the essential averment that the carrier was engaged in interstate commerce, said:—

> "The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted * * * and was not affected by the intervening lapse of time.' *Seaboard Air Line Ry.* vs. *Renn*, 241 U. S. 290, 293. 'The facts constituting the tort were the same, whichever law gave them that effect.' *Seaboard Air Line Ry. vs. Koennecke*, 239 U. S. 352, 354. See also *St. Louis, S. F. & T. Ry. Co.* vs. *Smith*, 243 U. S. 630. Of course an argument can be

made on the other side, but *when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.*"

The decisions of this Court thus make it clear that the assertion by suit of the *cause of action,* effective to toll the Statute, consists in a clear statement of the *basic facts* on which the claim is founded, and not in a mere statement or elaboration of the *history* of the controversy or of the precise *capacity* in which the plaintiff sues.

In the case at bar, the defendants were notified by the plaintiff corporation on March 20, 1917, that plaintiff intended to hold them legally responsible for the breach of the only contract which ever existed between the parties (Rec. p. 58-9; see also letter of January 18th, Rec. p. 57).

In March, 1918, defendants were officially advised, by the suit instituted, of plaintiff's determination to hold them liable, the declaration setting out the contract and the breach, in six counts, with every conceivable ramification.

There is no thought in this case, but that the defendants had notice of this very claim from the beginning. To permit the plea of the statute to avail defendants would be to return to the days of Lord Coke when "the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared

to the quibbles, refinements, and technicalities of special pleading."

Caldwell, *J.*, in *McDonald* vs. *State of Nebraska*, 101 Fed. 171, 182.

The history, purpose and effect of the liberalization of amendments in the Federal Courts are nowhere more clearly summarized than in *McDonald* vs. *Nebraska*, 101 Fed. 171, 176-182, which was cited with approval by this Court in *M. K. & T. Ry.* vs. *Wulf*, 226 U. S. p. 577, *supra*.

This was a suit by the State Treasurer of Nebraska in his official capacity, to which defendant demurred on the ground that suit should have been brought in the name of the State. The trial Court having allowed an amendment after the period of the statute of limitations, substituting the name of the State as plaintiff, it was held that this was not error, the Court stating that the amendment made no change in the cause of action or in the real parties to the suit. In the course of the opinion Judge Caldwell said:—

> "But, independent of the Nebraska Code and the decisions of the supreme court of that state, we would have no difficulty in upholding the judgment of the lower court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the judiciary act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the

struggle to establish the political independence of their country. When this object had been achieved, and the constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the supreme court of the United States grasped the object and purpose of this enactment. In referring to this section of the judiciary act, the supreme court of the United States, speaking by Mr. Justice Story, said:

" 'The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of

the soundest protective policy.' *Matheson's Adm'rs.* vs. *Grant's Adm'rs.*, 2 How. 263, 281, 11 L. Ed. 261.

"And Mr. Justice Miller, speaking from the Circuit Bench, declared:

"'This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the modern codes. It is founded on common sense and justice, and ought to be regarded by the circuit courts as mandatory.'

* * * * * *

"A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. *But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff.* The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. *When a wrong party has been named as plaintiff, the*

action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations."

* * * * * * *

At the close of the opinion the Court contrasts forcibly the practice of the law as it was in Lord Coke's day, and as it is in the Federal Courts today:

"There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The Courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial and technical rules governing the statement of actions and defenses—for the entire system of special pleading was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the cause determines its decision, and

> not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and *what is meant by substantial right is a right going to the actual merits of the case.* Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of court, or to delay justice."

The Federal decisions are full of instances in which the Courts of the United States, acting pursuant to the broad powers and discretion conferred by Section 954, have refused to permit a party to defeat a just claim by taking advantage of a mere error in pleading by the other side, not affecting the substantial rights of the parties and not discovered until after the Limitation period had expired. A recent decision by the Circuit Court of Appeals for the Fifth Circuit is directly in point.

Willits & Patterson *vs.* Texas Refining Company, 2 Fed. (2nd) 547, was a suit by Willits & Patterson, a corporation, brought August 29, 1921, for breach of a contract made in July, 1919. In May, 1924, after the four years Limitation period had expired, plaintiffs asked leave to amend, alleging that Willits had made the contract individually and that it had afterwards been assumed by the plaintiff corporation which he had incorporated after making the contract, to take over the business theretofore conducted by him individually under the same name, Willits & Patterson.

The Circuit Court of Appeals (Walker and Bryan, *C. J.* and Dawkins, *D. J.*) held that the trial Court had erred in sustaining exceptions to the allowance of the amendment, saying (p. 549):—

> "In our opinion the only effect of the amendment in the present case was to permit the introduction of evidence which otherwise might have been objectionable under the petition as it stood. Like the original, it still asserts that the claim is the property of the corporation, and that it grows out of the same contracts and circumstances which were alleged in the original petition. In other words, the claim or cause of action is identical. We do not think that petitioner is required to allege all of his evidence, and the amendment in this case does nothing more than to set forth the history of the entire matter, including the nature of the title under which the plaintiff now owns and seeks to recover of the defendant. A judgment in this case will be con-

clusive, both as to Willits and the corporation. The petition fully advised the defendant of the nature and circumstances of the demand, and, whether it be the property of Willits or the corporation, its rights can be fully safeguarded in whatever decision may be made.

"Our conclusion, therefore, is that the lower Court erred in sustaining the exceptions, and for this reason the judgment is reversed, and the cause remanded, to be proceeded with according to law and views herein expressed."

See also Middlesex Banking Co. *vs.* Smith, 83 Fed. 133;

Dittgen *vs.* Racine Paper Goods Company, 164 Fed. 85, 171 Fed. 631.

Another decision by the Circuit Court of Appeals for the Fifth Circuit is instructive:—

Johnson & Co. *vs.* Staenglen and Muller, 85 Fed. 603, was a suit by Staenglen and Muller against Johnson & Co. on a contract. At the trial it came out that the contract had been made in the name of G. E. Staenglen alone and plaintiff sought to amend, after the limitation period had expired, alleging the making of the same contract by one member of the firm and its subsequent assumption by both. This amendment having been permitted was alleged as error. The Circuit Court of Appeals sustained the judgment for plaintiff on the amended complaint, saying (p. 606):

"It is further insisted that the cause of action set up in defendants' second amended original petition, after plaintiff had taken a nonsuit and the case had been reinstated, was barred by the

statute of limitation. The cause of action was the same as set out in the pleadings after the reinstatement of the case as had been made by the pleadings prior to the nonsuit. The cause of the action was the loss sustained by the plaintiffs in weight, grade, and quality of cotton as classified and allowed in Europe, and the agreement of November, 1886, was set out as the basis or foundation for the claim of Johnson & Co.'s liability for this loss. If the Court below ruled correctly—and we hold that it did—in allowing the contract to go in evidence as one which, under the facts, pleadings and evidence, could be set up by Staenglen & Muller as effective and binding between Staenglen & Muller and Johnson & Co., then there was no such difference between the case before and after the non-suit as would make the latter a new cause of action. Staenglen & Muller were the plaintiffs in the case as made in both instances, and Johnson & Co. were the defendants, the only difference in the two cases being that in the first instance the agreement was declared on as one that had been made originally between Johnson & Co. and Staenglen & Muller, and in the reinstated case as one made originally between Johnson & Co. and G. E. Staenglen, and assumed by Staenglen & Muller with the assent and approval of Johnson & Co. We therefore find no error in the refusal of the Court below to sustain the plea of the statute of limitations."

See also Patillo *vs.* Allen West Co., 131 Fed. 680, where Judge Sanborn of the Eighth Circuit in refusing to sustain defendants' plea of the Statute of

Limitations as applied to an amendment to the declaration, said:—

> "The demand under the amended complaint is for the same items and for the same amount as that under the original complaint."

A recent decision by the Circuit Court of Appeals for the Third Circuit reaches a similar conclusion under the Pennsylvania Death Statute, which, unlike the Federal Act, requires suit to be brought in the name of the widow, as such. In Quaker City Cab Company *vs.* Fixter, 4 Fed. (2nd) 327, plaintiff had sued as administratrix to recover damages under the Pennsylvania Statute for the death of her son. She was permitted to amend, after the statutory period, so as to sue as widow, and this was held proper by the Circuit Court of Appeals, the Court saying:—

> "We think that the amendment was one of form, and not of substance, and in such case an amendment may be made under sections 948 and 954 of the Revised Statutes of the United States (Comp. St. Sections 1580, 1591). *Federal Courts are very liberal in allowing amendments to prevent a miscarriage of justice.* McDonald *vs.* State of Nebraska, 101 F. 171, 41 C. C. A. 278; Murphy *vs.* Stewart, 43 U. S. (2 How) 263, 281, 11 L. Ed. 114; Reardon *vs.* Balaklala Consolidated Copper Co. (C. C.) 193 F. 189."

In an earlier decision, Van Doren *vs.* Pennsylvania Railroad, 93 Fed. 260, the same Court had reached the same conclusion, permitting the plaintiff, who had

brought suit in the District Court of New Jersey for death suffered in Pennsylvania, to amend by bringing suit as widow instead of administratrix, although the statutory period had run.

The Court said (p. 267):—

> "There is abundant authority to the effect that under a general power to allow amendments necessary for the determination of the real question in controversy between the parties, an amendment touching the capacity in which the plaintiff sues or declares should, when properly applied for, be permitted *where substantial justice requires it.*"

The Court then went on to discuss Section 954 permitting the Federal Courts to amend the pleadings, in its relation to Section 914, providing that the practice, pleadings, and forms and modes of proceedings in civil cases in the United States Court shall conform "as near as may be" to those in the State Courts and thus states the rule:—

> "The circuit courts are not bound to conform to state practice or pleadings in subordinate details where such conformity would result in gross or substantial injustice to litigants."

The Court cites decisions of this Court to the effect that the conformity required by Section 914 is required to be not "as near as may be *possible*, or even as near as may be *practicable*," but "as near as may be" thus giving the Federal Courts the "power to

reject, as Congress expected they would do, any subordinate provisions in such state statutes which in their judgment would unwisely encumber the administration of the law *or tend to defeat the ends of justice in their tribunals"* (Railroad *vs.* Horst, 93 U. S. 291).

The necessity for this discussion in the Van Doren case lay in the fact that the State decisions in Pennsylvania are clear against the allowance of such an amendment after the statutory period has expired.

In other words, if the Van Doren case had been in the Pennsylvania State Courts it would have been decided the other way.

See La Bar *vs.* N. Y., Sus. & W. R. R. Co., 218 Pa. 261.

The amendment did not introduce any new or different demand, nor amount to the assertion of a new "cause of action." It was a mere historical elaboration of the "cause of action" theretofore instituted by the party properly entitled to bring suit on it. While proper to avoid a variance between the pleadings and the proof, it in no sense constituted the equivalent of a new suit and when, in the exercise of the discretion of the trial Judge, he allowed it, it related back to the date of filing the original declaration in March, 1918. Clearly the subsequent ruling of the trial Court in sustaining defendants' plea of the Statute of Limitations and directing a verdict for defendants was erroneous, in that it gave effect to form and not to substance, and departed from the

principles adopted by the Federal Courts with regard to the amendment of pleadings.

It is respectfully submitted that the judgment of the Court below was erroneous and should be reversed.

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EDWIN A. LUCAS,
Attorneys for Plaintiff in Error.

SEP 10
WM. R. STAN

No. [redacted] 114

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

N. & G. TAYLOR COMPANY, INC., a Corporation
Petitioner,

vs.

JOHN A. ANDERSON and C. A. GUSTAFSON, doing business under the name of ANDERSON & GUSTAFSON, co-partners,
Respondents.

Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit. There heard on error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

OPPOSING BRIEF ON BEHALF OF RESPONDENTS.

HOBART P. YOUNG,
ATTORNEY FOR RESPONDENTS.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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OPPOSING BRIEF ON BEHALF OF RESPONDENTS.

Petitioner can maintain this suit in its own name as the assignee of the chose in action sued on, only by virtue of Section 18 of the Illinois Practice Act (Chapter 110, Cahill's R. S. 1923), but to state a cause of action under that Section it must allege in its declaration that it is the assignee of the chose in action and that it is the actual bona fide owner thereof and set forth how and when it acquired title.

The Illinois Supreme Court, in interpreting this act, has held that a declaration in a suit under this act does not state a cause of action unless it contains these allegations.

In *Allis Chalmers Mfg. Co. v. City of Chicago*, 297 Ill. 444, the Court said:

> "The allegations in regard to any assignment by the Allis Chalmers Company to the plaintiff do not appear in the original declaration, and no attempt to comply with this section of the Practice Act was made until the

filing of the amended declaration on December 2, 1919, six years after the expiration of the period of limitation for bringing suits against the city for damages by reason of the vacation of the street. A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title. A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. (*Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 *id.* 222.) The plea of the Statute of Limitations therefore presented a complete bar to the plaintiff's action. The amendment to the declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, but was the statement of a different cause of action in favor of the plaintiff by whom the suit was originally begun, based upon a different and contradictory state of facts."

The case at bar is identical with the case of *Allis Chalmers Mfg. Co.* v. *Chicago*, *supra*. Petitioner's amended declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, because the petitioner was the plaintiff all the way through, but was the statement of a different cause of action in favor of the petitioner by whom the suit was originally begun based upon a state of facts, which were alleged for the first time in the amended declaration.

In *Gallagher* v. *Schmidt*, 313 Ill. 40, (citing *Allis Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444), the Court held that a suit on a chose in action in the name of the original owner and a suit by an assignee thereof in his own name under Section 18 of the Illinois Practice Act are two separate and distinct suits, and that in a suit originally brought on a chose in action an amended declaration alleging the assignment thereof to the plaintiff sets forth a new cause of action. If the period of the Statute of Limitations has run, the suit is barred.

In the case at bar, the petitioner filed its amended declaration on May 14, 1924, after the Statute of Limitations had run. In its original declaration, filed March 7, 1918, petitioner alleged a contract between itself and the respondents, dated November 1, 1916, calling for the delivery of a large quantity of oil from the respondents to the petitioner, and charged a breach thereof, but the fact was that the petitioner had never entered into any such contract because it did not come into existence until February 1, 1917. Finding that it could not prove its case as charged, petitioner obtained leave to amend its declaration, and declared, as assignee of the contract, setting forth that it was the actual owner thereof and how and when it acquired title thereto, asserting its right to maintain the suit in its own name by virtue of Section 18 of the Illinois Practice Act. The Court allowed the amendment, and, of course, there was no error in this because the Court had the power to allow the amendment under Section 954 of the United States Revised Statutes. Nevertheless, the amended declaration stated a new cause of action, and the period in which to bring the suit having expired it was barred by the Statute of Limitations, if the respondents availed themselves of the right to plead the statute, as they did, which was an affirmative defense.

Whatever may be said about any injustice resulting from sustaining such a plea is beside the point. It may be said that an injustice results every time a cause of action is terminated by a plea of Statute of Limitations. Nevertheless, the petitioner had six years in which to bring its suit under Section 18 of the Illinois Practice Act. When it elected to avail itself of the right to sue under that section it took the section "cum onere."

There is no conflict between the decision of the Circuit Court of Appeals in this case and the decision of any other Circuit Court of Appeals or any other Federal Court on this question, nor is there any conflict in the decisions of the

Illinois Supreme Court in interpreting Section 18 of the Practice Act. The decisions of the Illinois Supreme Court are very plain and in entire harmony.

The decisions of the Supreme Court of a state construing its practice acts are binding on the federal courts.

On such a question of practice as is presented here, the Federal Courts will follow the decisions of the Supreme Court of the state where the suit is brought. (*Atlantic & P. R. Co. v. Hopkins*, 94 U. S. 11.) *Elmendorf v. Taylor*, 10 Wheat. 152, 158; *Memphis St. Railway v. Moore*, 243 U. S. 299; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116; *Chicago v. Obermayer Co.*, 268 Fed. 237; *Nederland Life Ins. Co., Ltd. v. Hall*, 84 Fed. 278, C. C. A. (7th Cir.).

In the last case cited (*Nederland Life Ins. Co., Ltd. v. Hall*, 84 Fed. 278), which was a decision by the Circuit Court of Appeals for the Seventh Circuit, the Court said:

> "As the practice in the courts of the United States must conform as near as may be to that in the courts of the state (R. S. Section 914), these decisions construing the practice acts of the state are binding upon the courts of the United States."

Cases relied upon by petitioner are not cases of pleading or practice, but of federal jurisdiction.

The cases upon which the petitioner most strongly relies are not cases where a question of practice or pleading was involved, but questions of federal jurisdiction. The *Wolf case* (*M. K. & T. Ry. v. Wolf*, 226 U. S. 570) was simply a case where a mother as sole beneficiary, and entitled to the whole of the recovery, brought suit under a Kansas statute to recover for the death of her son, and by amendment joined herself as administratrix so as to bring the

case under the federal statute; namely, the Federal Employers' Liability Act. The Court said, at page 574:

> "It is true the original petition asserted a right of action under the laws of Kansas without making reference to the act of Congress, but the court was presumed to be cognizant of the enactment of the Employers' Liability Act and to know that with respect to the responsibility of interstate carriers by railroads to their employes injured in such commerce after its enactment it had the effect of superseding state laws upon the subject."

In the *McDonald case* (*McDonald* v. *State of Nebraska*, 101 Fed. 171) the Court permitted the State of Nebraska to be substituted as plaintiff in place of the treasurer of the state. The Court held that there was no change of the real party plaintiff, and that the cause of action was not changed in the slightest degree. No question of state practice was involved.

In the case at bar, independent of the Illinois statute, no suit could be maintained in a court of law other than by H. N. Taylor and W. W. Justice, Jr., comprising the co-partnership. There was no suit ever commenced in the partnership name nor in its name for the use and benefit of another. After the statute had run, the petitioner, being the corporation to which the contract had been assigned, filed its amended declaration declaring as assignee under Section 18 of the Illinois Practice Act. The Supreme Court of Illinois has held that this stated a new cause of action. It has never held otherwise, nor has any Federal Court ever held differently. No lack of harmony would result if the Supreme Court of another state should happen to construe a similar section of its practice act differently, and the Federal Court sitting in that state should follow the state court. The contention of the petitioner that the decision of the Illinois Supreme Court interpreting and construing Section 18 of the

Illinois Practice Act is not a matter of state practice or pleading, but the pronouncement of a general rule of law cannot be sustained. It is purely a question of pleading and practice, and the decisions of the Supreme Court of Illinois are binding on the Federal Courts.

There can be no doubt that if the question presented here was before the Illinois Supreme Court that Court would sustain the plea of the Statute of Limitations just as the United States District Court did and as the United States Circuit Court of Appeals for the Seventh Circuit did. Judge Evans in his dissenting opinion asked the question, "Why should this Court adopt the holding of the *Allis-Chalmers case?*" Our answer to that is that this Court has uniformly held that the Federal Courts will follow the decisions of the Supreme Court of a state construing its practice acts. *Atlantic & P. R. Co.* v. *Hopkins*, 94 U. S. 11; *Nederland Life Ins. Co., Ltd.* v. *Hall*, 84 Fed. 278 (C. C. A.); *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Memphis Street Ry.* v. *Moore*, 243 U. S. 299; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100; *Chicago* v. *Obermayer Co.*, 268 Fed. 237. See 914 Revised Statutes. There is no confusion about these decisions, nor is there any confusion as to the interpretation of Section 18 of the Illinois Practice Act by the Illinois Supreme Court. *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444; *Gallagher* v. *Schmidt*, 313 Ill. 40. Therefore, we contend that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Horace P. Young,
Attorney for Respondents.

Supreme Court, U. S.
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No. 114

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

N. & G. TAYLOR CO., INC., a Corporation,
Plaintiff in Error,

vs.

JOHN A. ANDERSON and C. A. GUSTAFSON, doing business under the name of Anderson & Gustafson, co-partners,
Defendants in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR DEFENDANTS IN ERROR.

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ATTORNEY FOR DEFENDANTS IN ERROR.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1927.

N. & G. TAYLOR CO., INC., a Corporation,
Plaintiff in Error,

vs.

JOHN A. ANDERSON and C. A. GUSTAFSON, doing business under the name of Anderson & Gustafson, co-partners,
Defendants in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The facts in this case, as far as this appeal is concerned, are undisputed. However, counsel for plaintiff in error in their brief (p. 3) say that inasmuch as the trial Judge directed a verdict for the defendants "the defendants' breach of contract must be regarded as wholly unjustifiable and as attributable to their desire to reap the large profits available by the sale of plaintiff's oil to others at enhanced prices for delivery at nearby points for which tank cars were more readily available."

The contract was made during the World War, and the defendants anticipating that there might be some difficulty in getting tank cars in which to ship the oil inserted a special clause in the contract stating that their obligation to make deliveries was subject to their ability to secure tank cars for the shipment of the oil. (Rec. 37.) On account of war conditions and because the railroads placed embargoes

on shipments and would not permit tank cars to be loaded with oil for points east of the Indiana Ohio state line, the defendants were unable to ship the full amount of oil called for by the contract. While it is true that the full amount called for was never shipped, yet the defendants claim that they were excused under the contract and they filed appropriate pleas setting up their defense on the merits.

However, the merits of the case are not here involved and the question presented is the correctness of the ruling of the trial Court in sustaining the plea of the Statute of Limitations.

When was the contract breached?

Counsel for plaintiff in error seem to think that they can get some advantage for their legal position by contending that there was no "final breach" until March, 1917. The point seems to be that inasmuch as the plaintiff corporation did not come into existence until February 1, 1917, that they are in a better position to argue that the corporation "stepped into the shoes of the partnership" if there had been no breach of the contract while it was being performed between the partnership with whom it was made and the defendants in error. This point has no merit whatever as a matter of law, but the fact is that the plaintiff in error in both its original declaration and in its amended declaration alleges breaches of the contract during the months of November and December, 1916, and seeks to recover damages for failure to ship the full quantity of oil during those months. The amended declaration states "yet the said defendants did not nor would they within the time aforesaid either prior to February 1, 1917, to N. & G. Taylor Company, co-partners or afterwards to N. & G. Taylor Company, Inc. deliver the said oil * * *" (Rec. 36).

Moreover in the affidavit attached to the amended declaration, which under Section 18 of the Illinois Practice Act is

necessary to be filed with the declaration, the plaintiff in error swore that among the assets taken over on the first of February, 1917, by the corporation from the partnership there was included "a right of action against Anderson & Gustafson (defendants in error) for breach of contract from the first of November, 1916, or such time as the contract went into force to the 31st day of January, 1917." (Rec. 39.)

Furthermore, the Circuit Court of Appeals in its opinion in this cause found that defendants in error had breached the contract before the plaintiff corporation was organized. Mr. Justice Page, who wrote the opinion of the Court, said:

> "After defendants had defaulted thereon the co-partnership on February 1, 1917, sold all of its assets, including its rights under the contract, to appellant, called plaintiff, and plaintiff brought suit thereon in the Northern District of Illinois." (14 Fed. Rep. 2d Series, 353.)

and Mr. Justice Evans, in his dissenting opinion, on page 355, said:

> "When the corporation copartnership agreement above referred to was made (January, 1917) defendant had breached its contract, and thereafter continued to breach its agreement."

Thus it appears that what the plaintiff corporation took over from the partnership was a cause of action which *then existed* in favor of the partnership and against the defendants in error for damages for breach of contract during the months of November and December, 1916. In fact, the affidavit attached to the amended declaration limits the cause of action which was assigned to the corporation on February 1, 1917, to damages which were charged to have accrued up to that date. Counsel for plaintiff in error in their brief (p. 4) say that "although defendants fell behind in their deliveries from the beginning, the *actual legal breach* of contract by them did not occur until March, 1917." As we have pointed

out there is no basis for this attempted distinction between "actual" breach, and "final" breach. What happened in March, 1917, was merely that the corporation notified the defendants in error that it had terminated the contract because of the poor performance in the matter of deliveries.

The present cause of action did not accrue to the plaintiff corporation.

Counsel in their brief say (p. 14):

> "This is not a case (like the Illinois decisions relied on by the other side in the Court below) where one party to a contract, after a breach by the other, has assigned his completed cause of action to a distinct third party."

We contend that the present is just that kind of a case. The contract was between the co-partnership, N. & G. Taylor Co., and the defendants in error, and the claim for damages for the alleged breach during the months of November and December, 1916, (as well as the further responsibility under the contract) was assigned to the plaintiff corporation, which was a distinct third party. It is ridiculous to urge that the new corporation was merely a continuation of the old partnership. It was a distinct and separate entity and came into existence on February 1, 1917.

Counsel in their brief, say further:

> "It was not until March 20, 1917, therefore, that this present cause of action accrued, and it then accrued to the corporation, which had taken over the business of the partnership almost two months before."

What happened on March 20, 1917 was that the plaintiff corporation wrote a letter to the defendants in error, notifying them not to ship any more oil. The reason assigned was that

> "your performance in delivering oil has been so far below anything that could be called reasonable, that we

> have been convinced that there was no prospect of receiving from you any considerable proportion of your contract supply during the present spring and in view of our urgent need for fuel oil for our works we have therefore taken steps to secure a supply from other sources, although at an advanced rate."

The letter stated further, however, that

> "of course you (meaning defendants in error) will understand that our action in this regard was not taken in any way as relieving you from your obligations under the contract, or as an acknowledgment by us of the propriety of your excuse for your failure to live up to the terms of the contract." (R. 58.)

This notice, or letter, sent on March 20, 1917, did not *create* any cause of action, nor did it fix the date when any cause of action accrued. The cause of action accrued to the partnership when the contract was breached by the defendants in error.

Not only did plaintiff in error claim damages for failure to make the full shipment during the months of November and December, 1916, but, on the contrary, they actually undertook at the trial to prove up the shortage of deliveries during those months. (R. 63, 75.) The quantity called for by the contract was 150,000 gallons a month and on November 17, 1916, N. & G. Taylor Company, the co-partnership, wired defendants in error to rush delivery of the full November quota. (R. 72.) Defendants in error replied on the same day, stating

> "On account of the tank car situation we are very much behind in our fuel shipments and up to date have not been able to divert any cars to you to apply on your November orders. We hope to be able to divert a part of the cars already ordered the early part of next week, but it does not appear at all likely that we can divert any before that time." (R. 73.)

If the defendants in error were without legal excuse for not shipping the November installment of 150,000 gallons and

the December installment of the same amount, then they became liable to the N. & G. Taylor Co., a co-partnership, for damages and that cause of action accrued in the months of November and December, 1916, and in the affidavit attached to the plaintiff's amended declaration that claim or cause of action is specifically stated to have been assigned to the plaintiff corporation on February 1, 1917. We repeat that it is absurd to urge that the present cause of action accrued directly to the plaintiff corporation.

Counsel also say in their brief (p. 15):

> "While defendants fell behind in their agreed deliveries prior to the reorganization, this delay was apparently acquiesced in by plaintiffs until March 20, 1917, when, plaintiffs refused further to condone defendants' scanty deliveries and wrote defendants that in view of defendants' failure to keep up the agreed schedule of deliveries, plaintiffs would buy this oil elsewhere and hold defendants for the difference in price."

If the plaintiff in error acquiesced in the failure to make deliveries until March 20, 1927, then only such damages as accrued subsequent to that date and until the end of the term of the contract, which was June 30, 1917, could be recovered. If no claim accrued until March 20, 1917, then no claim existed which N. & G. Taylor Co., the co-partnership, could have assigned to the corporation on February 1, 1917.

The assertion which counsel for plaintiff in error put it their brief (p. 16) that "The two partners merely changed the form of their organization" is not worthy of reply. It has been repeatedly held that a corporation succeeding to a partnership business is a new and distinct entity.

Delay in case being reached for trial.

There is one more point, which we wish to mention before proceeding to the citation of authorities and our argument on the real question involved here, and that is the effort on

the part of counsel for plaintiff in error to place the responsibility on the defendants in error for the delay in this case being reached for trial, which gave the defendants in error their opportunity to plead the Statute of Limitations. Counsel in their brief say (p. 5): "Owing to a congested docket and to a postponement requested by defendants, the trial was not held until May 12, 1924, more than six years after the cause of action accrued." It is true that the docket was congested, but whatever postponements there were at the instance of counsel on either side, were made by agreement, and counsel for plaintiff in error requested as many continuances as counsel for defendants in error.

ARGUMENT.

Summary.

We assert the following propositions of law:

I.

(A) In a suit brought under Section 18 of the Illinois Practice Act by the assignee of a non-negotiable chose in action in his own name the pleading must allege that he is the actual bona fide owner thereof and set forth how and when he acquired title.

Cahill Illinois Revised Statutes, 1927, Chap. 110, Sec. 18, p. 1944.

(B) Unless such a declaration contains the allegations required by Section 18, showing the assignment of the chose in action, the actual ownership thereof by the plaintiff, and setting forth how and when he acquired title, it does not state a cause of action.

Allis-Chalmers Mfg. Co. v. *Chicago*, 297 Ill. 444.

(C) A cause of action stated in an amendment to such a declaration alleging those facts, filed after the Statute of Limitations has run, is barred.

Gallagher v. *Schmidt*, 313 Ill. 40.

II.

Under the Federal cases the amended declaration stated a new cause of action.

III.

(A) The contract was not assignable without the consent of the defendants in error.

(B) The claim for damages for breach of the contract up to the time when the partnership went out of business was assignable. This is the claim which is specifically referred to in the affidavit attached to the amended declaration.

I.

(A) Effect of Section 18 of Illinois Practice Act and the Statute of Limitations as construed by the Supreme Court of Illinois.

Section 18, Chapt. 110, Illinois Practice Act, so far as material to the present case, is as follows:

> "The assignee and equitable and *bona fide* owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual *bona fide* owner thereof, and set forth how and when he acquired title, * * *."
>
> Cahill's Illinois Revised Statutes, 1927, p. 1944.

In its original declaration, filed March 7, 1918, plaintiff in error alleged a contract between itself and defendants in error, dated November 1, 1916, calling for the delivery of a large quantity of oil from defendants and charged a breach thereof. The fact was, however, that plaintiff in error had never entered into any such contract because it did not come into existence until February 1, 1917. The contract referred to was between a co-partnership doing business as N. & G. Taylor Co. and the defendants in error.

Plaintiff in error, finding that it could not prove that defendants in error had ever contracted with it, asked leave to amend its declaration. This was granted, and properly so, both under the broad power of Federal Courts to grant amendments under Section 954 of the United States Revised Statutes and also under the Illinois Statutes on Amendments. (Ill. Rev. Stats., 1927, Chapt. 7, Sec. 1.) In the amended declaration, plaintiff in error declared as assignee

of the contract, setting forth that it was the actual owner thereof, and how and when it acquired title thereto, asserting its right to maintain the suit in its own name by virtue of Section 18 of the Illinois Practice Act.

Under the Illinois decisions the plaintiff in error stated a new cause of action in the amendment.

Allis-Chalmers Mfg. Co. v. *City of Chicago*, 297 Ill. 444.

Gallagher v. *Schmidt*, 313 Ill. 40.

After the amendment was made the defendants in error filed a plea of the Statute of Limitations which was sustained by the trial Court and later by the Circuit Court of Appeals.

That decision is correct under the cases of *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, 297 Ill. 444, and *Gallagher* v. *Schmidt*, 313 Ill. 40.

(B) A declaration by the owner of a non-negotiable chose in action which fails to allege compliance with Section 18 states no cause of action.

In *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, 297 Ill. 444, 450, the Court said:

> "The allegations in regard to any assignment by the Allis-Chalmers Company to the plaintiff do not appear in the original declaration, and no attempt to comply with this section of the Practice act was made until the filing of the amended declaration on December 2, 1919, six years after the expiration of the period of limitation for bringing suits against the city for damages by reason of the vacation of the street. A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title.

A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. (*Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 *id.* 222.) The plea of the Statute of Limitations therefore presented a complete bar to the plaintiff's action. The amendment to the declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, but was the statement of a different cause of action in favor of the plaintiff by whom the suit was originally begun, based upon a different and contradictory state of facts."

(C) A cause of action stated in an amendment complying with Section 18 is barred if the Statute of Limitations has then run.

In the case of *Gallagher* v. *Schmidt*, 313 Ill. 40, the Court refers to the case of *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, *supra*, and holds that a suit on a chose in action and a suit by an assignee in his own name on the same chose in action under Section 18 of the Illinois Practice Act are two separate and distinct suits, and that in a suit originally brought on the chose in action an amended declaration alleging the assignment thereof sets forth a new cause of action. If the Statute of Limitations has then run, it is a bar to the new cause of action stated in the amended declaration.

In fact, counsel for plaintiff in error concede that, if this case were before the Supreme Court of Illinois the judgment would be affirmed, but they contend that the Federal Courts should adopt a different rule.

II.

(A) Under the Federal cases the amended declaration stated a new cause of action.

The dissenting opinion of Judge Evans and the argument of plaintiff in error proceed upon the theory that the Illinois decisions above cited are not conclusive as to whether a new cause of action is stated by an amendment made in order to conform to Section 18 of the Practice Act. The argument is based mainly upon *Swift* v. *Tyson*, 41 U. S. 1, 18. The point seems to be that the decisions holding that the Statute of Limitations is applicable if the amendment occurs after the statutory period has expired are merely *inferences* from Section 18, and that the Federal Courts are not bound by these inferences. The question is twofold: *first*, whether the Illinois decisions are merely inferences from the statute, rather than a construction of it, by which the Federal Courts are concededly bound; and, *second*, conceding for the purposes of the argument that the Illinois decisions are but inferences from the statute, whether their persuasiveness and determinative value as precedents is lessened thereby.

(B) Illinois decisions are not mere inferences from Section 18 of the Practice Act.

It will be noted that Section 18 provides that the assignee of any non-negotiable chose in action may sue thereon in his own name (which could not be done in Illinois before the enactment of this statute). It then provides that the assignee shall in his pleading on oath allege: (1) that he is the actual *bona fide* owner thereof and (2) how and when he acquired title.

The Illinois decisions are to the effect (1) that no assignee can sue in his own name without compliance with this section

and (2) where he does so for the first time in his amended declaration he may be barred by the Statute of Limitations as he has then for the first time stated a cause of action *under this Act.*

It should be particularly noted that, when this suit was instituted, the plaintiff in error was in no way obliged to bring itself within this statute *and did not make any attempt to do so.* Suit could have been brought (1) in the name of the partnership, (2) in the name of the partnership for the use of the corporation, or (3) in the name of the corporation *provided it comply* with Section 18. Instead of choosing any of these alternatives, the corporation chose to sue in its own name, without making any attempt to comply with the Act, and just as if it had originally made the contract with the defendants in error.

There was no attempt, not even a defective attempt, to state a cause of action under the statute. Had the plaintiff in error's declaration stated that it was the actual *bona fide* owner of the chose in action, but had omitted to state how and when it obtained title, there would have been a defective statement of the cause of action. This defect would have been fatal under the Illinois decisions, but assuming that under the Federal decisions it would be held that this was merely a defective statement of a cause of action and could be cured by amendment without being barred by the Statute of Limitations, yet we contend that such a holding would not help the plaintiff in error here, because that question is not in this case. The plaintiff in error did not attempt to state a cause of action under Section 18 of the Illinois Practice Act, and therefore its original declaration cannot be held to be a defective statement of a cause under said section. The original declaration stated a good cause of action and it was properly set forth, and the plaintiff in error could have recovered if the facts alleged were true, but they were not.

and plaintiff in error abandoned *that* cause of action, and set up a *new* cause of action in its amended declaration.

From this illustration it readily appears that decisions to the effect (1) that when an assignee sues in his own name without making any attempt to state a cause of action under the statute; (2) that an amendment complying with Section 18 for the first time states a cause of action and that it is a new cause of action and (3) that the new cause of action is barred if the statutory period has elapsed represent the inevitable effect and operation of the Act under discussion and are in no sense mere inferences from that Act.

(C) Even considered as inferences the decisions of state courts based upon local questions are binding upon Federal Courts.

The recent case of *Irving National Bank* v. *Law*, 9 F. (2d) 536, 10 F. (2d) 721, C. C. A., 2d Cir., is directly in point.

The Court said, 9 F. (2d) 536, 537:

> "The question at bar is of the meaning of Section 13 of the Civil Practice Act of New York, which, so far as relevant, provides that when a cause of action, as in the case at bar, arises outside New York, 'an action cannot be brought * * * after the expiration of the time limited by the laws of a state or country where the cause of action arose.' Two views are possible of this provision, one, that the law exposed persons sued in New York to no longer a period of limitation than did the law of the place where the cause of action arose; the other, that no one should be sued in New York if at the time he could not be sued in the state where the cause of action arose."

An Appellate Division case had ruled that the second was the proper view, but, after considering the question, the Circuit Court of Appeals for the Second Circuit decided that a construction of a statute by the Appellate Division was not of sufficient authority to preclude it from applying its own

construction of the statute; whereupon, after criticism of the Appellate Division precedent, the Circuit Court of Appeals decided that the first was the proper view.

Upon the rehearing in the Circuit Court of Appeals the plaintiff called attention to two decisions of the Court of Appeals of New York, which neither party had cited at the first argument, and both of which tacitly assumed that the second view, that which the Circuit Court of Appeals had previously declined to follow, was the proper one. The Court said as to those decisions (10 F. (2d) 721, 722):

> "• • • they seem to us conclusively to construe section 13 of the New York Civil Practice Act in the sense that the plaintiff desires."

After stating the two New York Court of Appeals cases the Circuit Court of Appeals said:

> "Although the construction of section 13 was assumed *sub silentio* in both opinions of the Court of Appeals, in spite of Judge Cardozo's dissent in the first, the ruling is authoritative upon us, regardless of our own opinion to the contrary. In obedience to it we therefore now decide that the action at bar was begun in season."

The fact that the Circuit Court of Appeals thought it necessary to reverse its own previous decision forcibly illustrates the reluctance of Federal Courts to depart from the decisions of a state Court of last resort applying its Statute of Limitations, *even when the statute is not expressly construed.*

The case at bar is even stronger for the application of the Illinois decisions than *Irving National Bank* v. *Law* is for the application of the New York decisions. The Illinois Supreme Court has not left the application of Section 18 of the Practice Act to be deduced from its decision, but in *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444, 450, it has unequivocally stated just what that construction is:

> "The allegations in regard to any assignment by the Allis-Chalmers Company to the plaintiff do not appear

in the original declaration, and no attempt to comply with this section of the Practice Act was made until the filing of the amended declaration on December 2, 1919, six years after the expiration of the period of limitation for bringing suits against the city for damages by reason of the vacation of the street. A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title. A declaration which fails to allege a fact without whose existence the plaintiff is not entitled to recover does not state a cause of action. (*Walters* v. *City of Ottawa*, 240 Ill. 259; *Prouty* v. *City of Chicago*, 250 *id.* 222.) The plea of the Statute of Limitations therefore presented a complete bar to the plaintiff's action."

In view of plaintiff in error's remark on page 18 of its brief that "the practice of the law is no longer a game between opposing lawyers" it may be observed that this case was brought on behalf of the plaintiff by Illinois lawyers of many years' experience. Presumably these gentlemen are as familiar with the rules of the game as played in Illinois as the defendants' attorneys and, if they desire to bring suit in Illinois or based on an Illinois statute they must proceed in accordance with the rules laid down by the Supreme Court of Illinois.

(D) Cases cited by plaintiff in error distinguishable.

In his dissenting opinion Judge Evans argues that, under the Federal decisions, no new cause of action was stated by the amended declaration. The first case cited is *N. Y. Cent. R. R.* v. *Kinney*, 260 U. S. 340. He quotes:

"The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted and was not affected by the intervening lapse of time.'"

As applied to the present case, we believe that this overlooks the fact that there was no cause of action in favor of the corporation already asserted under the Illinois statute and, consequently, there was nothing to be expanded or amplified. If the plaintiff had even defectively stated a cause of action under Section 18, for instance, if it had stated, that it was the actual bona fide owner of the chose in action, but omitted to state how and when it acquired title, there would be at most a defective cause of action stated which might later have been expanded and amplified by the addition of the second essential allegation, to wit: how and when he acquired title. The first allegation alone would be held to state no cause of action at all in the Illinois, courts, but at least that much is required to state even a defective cause of action in the Federal courts.

Great reliance is also placed upon *M. K. & T. Ry.* v. *Wulf*, 226 U. S. 570. In that case the plaintiff brought her action in her individual capacity as mother of the deceased, when she should have brought it in her capacity as his administratrix. She was the sole heir and beneficiary of his estate. There had been no administration upon his estate at the time of the filing of the original petition, and it would have been impossible for her to have proceeded as administratrix at that time. After the two years Statute of Limitations had run she amended her petition to proceed as administratrix. This Court held that the amended petition did not state a new cause of action, because it stated no different state of facts as the cause of action and therefore related back to the beginning of the suit.

In that case the right of action was in the same person, the mother of the deceased, whether she sued in her individual or her representative capacity. In the case at bar the right of action was in the partnership, a totally different entity from the corporation which attempted to recover damages upon a contract to which it had never been a party.

There was here no case of the same entity suing originally in its individual capacity and then amending to sue in a representative capacity. The corporation sued in its own right in the first instance and the corporation remained the plaintiff throughout. Only after the Statute of Limitations had expired against the partnership, the owner of the cause of action, did the corporation make any showing that it had a right to recover in its corporate capacity, as assignee of the original owner.

The case at bar is more like *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285. The majority opinion of the Circuit Court of Appeals in the case at bar points on the distinction, that in the *Wyler case* the plaintiff, by amendment, abandoned the common law charge and rested the cause of action upon a statute. This Court in the *Wyler case* held that this amendment introduced a substantially new cause of action to which the bar of the Statute of Limitations applied.

Judge Page's opinion concludes on this subject:

> "We are of opinion that the difference between the *Wyler case* and the *Wulf case*, is one of the material differences between the *Wulf case* and the case at bar."

In the case at bar the plaintiff had no right whatever to recover at common law. Whatever right it had is necessarily based upon Section 18, permitting the assignment of the cause of action. The plaintiff in error here abandoned its attempt to recover upon any common law theory and sought to bring the case within the statute. The situation is the same as in the *Wyler case*.

As Mr. Justice Alschuler said in his separate opinion, (14 Fed. Rep., 2 Series, 355):

> "The amendment to the declaration was not a substitution of a proper party plaintiff for one in whose name the action had been improperly begun, but was the statement of a different cause of action in favor of the plaintiff by whom the suit was originally begun, based upon a

> different and contradictory state of facts." *Allis-Chalmers Mfg. Co.* v. *City of Chicago*, 297 Ill. 444, 130 N. E. 736, cited in *Gallagher* v. *Schmidt, et al.*, 313 Ill. 40, 144 N. E. 319.

The case of *Willits & Patterson* v. *Texas Refining Company*, 2 Fed. (2d Series) 547, cited by counsel, went up to the Court of Appeals from the District Court of the United States for the Northern District of Texas. The decision was based on *Mann* v. *Mitchell*, 241 S. W. 715 (decided by the Texas Court of Civil Appeals). The suit was brought on a promissory note given by the defendant in payment of a stock subscription. The original declaration described the note as payable to the Commonwealth Bonding & Casualty Insurance Company, for which company the plaintiff was receiver. In the amended petition, the note was described as payable to the Commonwealth Organization Company and later transferred and endorsed to the Commonwealth Bonding & Casualty Insurance Company. The Court held that the original and amended petitions set forth the same cause of action, and that the amendment simply corrected a misdescription of the note sued on. The cause of action was negotiable, and, as the Court said in the case of *Willits & Patterson* v. *Texas Refining Co., supra*, page 549:

> "• • • The only effect of the amendment in the present case was to permit the introduction of evidence, which, otherwise might have been objectionable under the petition as it stood. Like the original, it still asserts that the claim is the property of the corporation and that it grows out of the same contracts and circumstances which were alleged in the original petition. In other words, the claim, or cause of action, is identical."

In the case at bar, the chose in action was non-negotiable, and the plaintiff could maintain suit in its own name only by virtue of Section 18 of the Illinois Practice Act, and then it was required to aver that it was the actual *bona fide* holder,

and how and when it got title. Such facts were necessary to state a cause of action in its own name.

The case of *Johnson & Co.* v. *Staenglen & Muller,* 85 Fed. 603, cited by counsel in their brief, is not in point. In that case, the agreement declared on in the original suit was one that had been made originally between Johnson & Co. and Staenglen & Muller, and in the reinstated case the agreement declared on was one made originally between Johnson & Co. and G. E. Staenglen and assumed by Staenglen & Muller with the assent and approval of Johnson & Co. The Court found that after the contract was made, Muller became a partner of Staenglen, and notice was given to Johnson & Co., and thereafter all business was done between Johnson & Co. and Staenglen & Muller. Goods were invoiced to Staenglen & Muller and drafts drawn on Staenglen & Muller, which were paid by that firm. The Court held that these dealings between the parties, after knowledge of the succession of Staenglen & Muller to the business of G. E. Staenglen, gave the agreement the same force and effect as if it had been made between Johnson & Co. and Staenglen & Muller.

In the case of *Quaker City Cab Co.* v. *Fixter,* 4 F. (2d) 327, cited by plaintiff in error, it appeared in the statement of claim that the claimant was the widow of the deceased as well as administratrix. The state statute required her to sue as widow. The amendment made in that case consisted in striking out the words "administratrix of the estate of Walter Fixter, deceased" from the first and last paragraphs of the statement of claim. It was held that this was not a statement of a new cause of action and was not, therefore, barred by the Statute of Limitations. It seems to us that this is a good example of the statement of a merely defective cause of action, which might be cured by amendment under the Federal cases. The suit was brought by the right party, but as administratrix instead of as widow. Her statement

of claim showed that she was the right party. In the case at bar the suit was brought by the wrong party and its declaration not only failed to show that it was the right party under the wrong name, as in *Quaker City Cab Co.* v. *Fixter*, but the declaration contained nothing to indicate that the plaintiff was interested in any way in the contract upon which it brought suit.

(E) The decisions of the Supreme Court of a state construing its practice acts are binding on the Federal courts.

On such a question of practice as is presented here, the Federal Courts will follow the decisions of the Supreme Court of the state where the suit is brought. (*Atlantic & P. R. Co.* v. *Hopkins*, 94 U. S. 11.) *Elmendorf* v. *Taylor*, 10 Wheat. 153, 158; *Memphis St. Railway* v. *Moore*, 243 U. S. 299; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 116; *Chicago* v. *Obermayer Co.*, 268 Fed. 237; *Nederland Life Ins. Co., Ltd.*, v. *Hall*, 84 Fed. 278, C. C. A. (7th Cir.).

In the first case cited (94 U. S. 11) the Court said:

> "As the practice in the courts of the United States must conform as near as may be to that in the courts of the state (R. S. Section 914), these decisions construing the practice acts of the state are binding upon the courts of the United States."

In *Great Southern Life Ins. Co.* v. *Burwell*, 12 F. (2d) 24 (C. C. A., 5th Cir.), certiorari denied by this Court, 271 U. S., 689, 46 S. Ct. 633, 70 L. Ed. 1150, it appeared that the Mississippi Code provided that all life insurance companies doing business in the state should deliver to the insured with the policy a copy of his application, and that in default thereof the company should not be permitted in any court of the state to deny that any of the statements in the application were true. It was held that that provision, as construed by the Supreme Court of the state, is a rule of substantive law, inhering in the contract, and not merely a rule of evi-

dence, and as such, applies to actions in the Federal courts within the state.

In the case at bar, whether considered as a question of practice or as a rule of substantive law, Section 18 of the Illinois Practice Act is such a part of the contract between the partnership and the defendants in error that the corporation succeeding the partnership cannot sue upon the contract to which it has never been a party without complying with that requirement of the Practice Act.

In *Jones* v. *Prairie Oil & Gas Co.*, 273 U. S. 195, (Jan. 24, 1927), the Court said, by Mr. Justice Holmes:

> "* * * no case yet has gone to the length of undertaking to correct the construction of state laws by state courts. The exclusive authority to enact those laws carried with it final authority to say what they mean. The construction of those laws by the Supreme Court of the state is as much the act of the state, as the enactment of them by the legislature. If we thought the decisions cited far more questionable than we do, we nevertheless should bow to them as binding upon a matter of local administration and of only local concern."

III.

(A) Contract sued on was not assignable.

We shall not argue the question whether the contract itself was assignable, because we concede that the claim for damages which had accrued during the period that the contract was in force between the original parties, was assignable; or, in other words, the *executed* part of the contract was assignable. This is all that was sought to be recovered under the amended counts. The contract as far as it was *unexecuted*, we contend, was not assignable, because it had in it the personal trust and credit feature, and also because the quantity of oil specified was the requirements of N. & G. Taylor Co., the co-partnership, and not the requirements

of some corporation which might later be organized to take over the business of the co-partnership. We do not think this question is in the case, but the following authorities support our position:

Arkansas Valley Smelting Co. v. *Belden Mining Co.*, 127 U. S. 379.

Demarest v. *Dunton Lumber Co.*, 161 Fed. 264.

Thomas-Bonner Co. v. *Hooven, Owens & Rentschler Co.*, 284 Fed. 386, (C. C. A.); same case, 284 Fed. 377 (Dis. Ct.).

Delaware Co. v. *Diebold Co.*, 133 U. S. 473.

Burck v. *Taylor*, 152 U. S. 634.

(B) The executed and assignable part of the contract.

As far as the *executed* part of the contract is concerned, we contend that the defendants lived up to their obligations and shipped all the oil which they agreed to ship under the conditions which existed. The evidence showed not only that they used every effort to get tank cars in which to ship the oil, but that they succeeded to an extent sufficient to supply the requirements of N. & G. Taylor Co. during the period from November 21, 1916, to February 1, 1917, when that co-partnership went out of business.

CONCLUSION.

The plaintiff in error has much to say about technicalities of common law pleading in Illinois and the danger of a return to the days of Lord Coke. The fact of the matter is that leave to file the amended declaration was properly granted by the District Court and that leave to file the same amendment would have been properly granted under the very liberal Illinois Statute on Amendments which provides:

> "That the court in which an action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or sub-

stance, for the furtherance of justice on such terms as shall be just, at any time before judgment rendered therein."

Cahill's Illinois Revised Statutes, 1927, (in force July 1, 1874), Chapt. 7, Sec. 1, p. 94.

The Statute of Limitations would not be a good defense, either in the Federal courts or Illinois courts, had the amendment been filed in apt time.

Something is said about the injustice of sustaining the plea of the Statute of Limitations, when the defendant knows all about the nature of the claim upon which he is sued. We might observe that the same situation would be presented if a defendant were sued upon a note made by him but barred by the Statute of Limitations. The fact that he would know all about the matter has never been supposed to prevent the successful pleading of the statute as a bar. Suppose the defendants in error in the case at bar had been fully advised by the plaintiff in error as to the nature of its demand and that it had in good faith acquired the chose in action from the partnership, but did not bring suit upon its claim until the statute had run. Can it be supposed that the defendants' knowledge would excuse the failure of the plaintiffs in error to set up its claim in the manner prescribed by law?

But we do not consider it necessary to defend the policy of the Statute of Limitations. As this Court has recently said:

> "The defense of the Statute of Limitations is not a technical defense, but substantial and meritorious. The great weight of modern authority is to this effect." *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 299.

It is respectfully submitted that the judgment of the Circuit Court of Appeals affirming the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

Hobart P. Young,

Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 114.—October Term, 1927.

N. & G. Taylor Company, Inc., Petitioner,
vs.
John A. Anderson and C. A. Gustafson.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 3, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

N. & G. Taylor Company, a partnership composed of Taylor and Justice, had long been engaged in the manufacture of tin plate. November 1, 1916, respondents and that partnership entered into a contract by which the former agreed to furnish, in fairly equal monthly quantities, and the latter agreed to take and pay for the fuel oil required by it, estimated at 1,200,000 gallons, for the eight months ending June 30, 1917. On January 31, 1917, the partners caused petitioner to be organized, giving it the name of the partnership with the word "Incorporated" added. As of February 1, 1917, the corporation assumed the liabilities of the partnership and took over all its property and has since carried on the business.

The petitioner commenced this action in the northern district of Illinois, eastern division, March 7, 1918. The declaration alleged an agreement between respondents and petitioner for the delivery of the oil, a breach by respondents, and resulting damage. No reference was made to the partnership, the contract between it and respondents, the subsequent creation of petitioner or its acquisition of the business. At the trial in May, 1924, petitioner by leave of court filed an amended declaration alleging that respondents and the partnership made an agreement for the oil in question; that on February 1, 1917, petitioner became the owner of all the assets of the firm including the agreement and all rights appertaining to it; that respondents failed and refused to deliver the oil either prior to February 1, 1917, to the partnership or afterwards to the petitioner—except approximately 40,000 gallons which was delivered to the partnership—and that thereby

petitioner itself and as successor of the firm was subjected to great loss. Section 18 of the Illinois Practice Act (c. 110, Cahill's Revised Statutes, 1927) provides that the assignee of any chose in action not negotiable may sue thereon in his own name, "and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title . . . ." In order to comply with that provision, the petitioner filed the affidavit of its president stating that on February 1, 1917, it took over the partnership assets including the contract and a right of action against respondents for its breach from the time it went into force to January 31, 1917.

Respondents, by plea to the amended declaration, set up a statute of Illinois (Revised Statutes, c. 83, § 20) declaring that, when a cause of action has arisen in another State "and by the laws thereof an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State," and one of Pennsylvania (§ 13,857 Pennsylvania Statutes) providing that actions on contracts must be commenced within six years from the time the right of action accrued; and alleged that the cause of action arose in Pennsylvania more than six years before the filing of the amended declaration and was barred by the laws of both States. The trial court held that the amended declaration stated a new cause of action and that it was barred, directed a verdict and gave judgment for the respondents. The Circuit Court of Appeals affirmed. 14 F. (2d) 333. This Court granted a writ of certiorari. 273 U. S. 681.

Section 18 of the Illinois Practice Act will be applied in the courts of the United States sitting in that State. R. S. § 914. *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 488. In the absence of such a provision an assignee of a non-negotiable chose in action could not sue in his own name. *Glenn* v. *Marbury*, 145 U. S. 499, 509. The advantage conferred is taken subject to the terms specified, and the assignee must make the required showing in respect of ownership and source of title. It is established by the decisions of the Supreme Court of Illinois that in an action under that section a declaration that does not state that plaintiff is the actual bona fide owner thereof and set forth how and when he acquired title fails to state a cause of action. And it is also held that a cause of action set forth in a declaration

amended to comply with that section is barred if the period fixed by the statute of limitations has expired when the amended pleading is filed. Applying the state law, it must be held that the amended declaration set up a new cause of action which was then barred. *Gallagher* v. *Schmidt*, 313 Ill. 40; *Allis-Chalmers Mfg. Co.* v. *Chicago*, 297 Ill. 444.

Petitioner invokes R. S. § 954 providing that any court of the United States may at any time permit either of the parties to amend any defect in the pleadings upon such conditions as it shall in its discretion and by its rules prescribe. And it contends that federal courts allow such amendments independently of state enactments and decisions, and that here the amended declaration complied with § 18 of the Illinois Act, but stated no new cause of action.

Section 954 governs amendments and is to be liberally construed. *Norton* v. *Larney*, 266 U. S. 511, 516, and cases cited. But the propriety of the filing of the amended declaration is not involved as permission was granted on the application of the petitioner. The substance of the change is to be regarded. In any view, a new cause of action was brought in more than six years after it accrued. The original declaration alleged an agreement between respondents and petitioner and set it out in *haec verba*. It was a letter dated November 1, 1916, addressed to "N. & G. Taylor Company" and signed by respondents. The words "Accepted: N. & G. Taylor Co." appeared at the end of the letter. That declaration did not attempt to state a cause of action under § 18 of the state Practice Act. Petitioner did not sue or claim as assignee. No reference was made to the contract between respondents and the partnership. The cause of action there stated never existed. The amended declaration states a cause of action for breach of the contract that was made by the partnership. It cannot be treated as curing a defective statement of a cause of action theretofore attempted to be set up. Cf. *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 222. The change was not merely one of form; the fundamental substance of the claim was different. Cf. *Friederichsen* v. *Renard*, 247 U. S. 207, 213. It is clear that the amended declaration substituted a new cause of action. Petitioner cites and relies on *Mo., Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 570. But that case does not support its contention. There the amendment, allowed after the expiration of the period prescribed by the statute of limi-

tations, related to form and not to the substance of the cause of action. The court said (p. 576): "It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit".

And it is plain that six years had expired when the amended declaration was filed. Respondents were in default when petitioner took over the business February 1, 1917. That appears from the allegations of the amended declaration as well as from the supporting affidavit. The contract covered fuel oil required in a period ending June 30, 1917. The action was commenced March 7, 1918; the cause of action had then accrued. The amended declaration was filed May 14, 1924, more than six years after the action was commenced. It cannot be deemed to relate back as it brought in a new cause of action, which must be treated as commenced at the time the amended declaration was filed. *Union Pacific Railway* v. *Wyler*, 158 U. S. 285, 296, *et seq; Salyers* v. *United States*, 257 Fed. 255, 259.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.